IN THE

Supreme Court of the United States

October Term 1946

No. 89

UNITED STATES OF AMERICA,

Appellant,

against

NATIONAL LEAD COMPANY, TITAN COMPANY, INC., E. I. DU PONT DE NEMOURS AND COMPANY,

Appellees

No. 90

NATIONAL LEAD COMPANY, TITAN COMPANY, INC.,

Appellants,

against

UNITED STATES OF AMERICA,

Appellee

Appeals from the District Court of the United States for the Southern District of New York

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BRIEF FOR NATIONAL LEAD COMPANY AND TITAN COMPANY, INC.

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Statement as to Abbreviations Used in Brief

On the trial, in the District Court's opinion and findings, and in the judgment, the many companies involved were referred to by initial letters or by abbreviated names. These initials and abbreviations are frequently used in this brief. For convenience they are listed below, as follows:

NL or National	— National Lead Company
DP or du Pont	— E. I. du Pont de Nemours and Company
Tinc or Titan	— Titan Company, Inc.
TP or Pigment	— The Titanium Pigment Company, Inc.
Krebs	— Krebs Pigment & Color Corporation
TAS or Titan A/S	— Titan Co. A/S
IG or I. G. Farben	— Interessengemeinschaft Farbenindustrie Aktiengesellschaft
TG or Titangesellschaft	— Titangesellschaft m.b.H.
SIT or Société Industrielle	— Société Industrielle du Titane
ICI	— Imperial Chemical Industries, Ltd.
GW or Goodlass Wall	— Goodlass Wall and Lead Industries, Ltd.
ISC	— Imperial Smelting Corporation, Ltd.
BTP or British Titan	— British Titan Products Company, Ltd.
NTP or Laporte	— National Titanium Pigments, Ltd.
CIL	— Canadian Industries, Ltd.
CTP	— Canadian Titanium Pigments, Ltd.
KK or Kokusan	— Kokusan Kogyo Kabushiki Kaisha
TK	— Titan Kogyo Kabushiki Kaisha
Terres Rares	— Société des Produits Chimiques des Terres Rares
Thann	— Fabriques des Produits Chimiques de Thann et de Mulhouse
Montecatini	— Societa Anonima Titanium
Aussig	— Verein fur Chemische und Metallurgische Produktion

TINC, IG, TG, ICI, ISC, GW, BTP, CIL, CTP, KK, and TK are sometimes collectively referred to as the Titan Companies and, with National and du Pont, as the Allied Companies.

Aussig, Montecatini, Terres Rares, Thann, and Laporte are sometimes collectively referred to as the Blumenfeld Companies.

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NATIONAL LEAD COMPANY, TITAN COMPANY, INC., *Appellants*, *against* UNITED STATES OF AMERICA, *Appellee*		No. 90

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR NATIONAL LEAD COMPANY AND TITAN COMPANY, INC.

Opinion and Judgment Below

The opinion and judgment of the District Court are reported in 63 F. Supp. 513 (1945). They are printed at R. 185 and 308, respectively.

Jurisdiction

The judgment of the District Court was entered October 11, 1945 (R. 307). The petitions for appeal were filed in and

granted by the District Court December 10, 1945 (R. 329, 336). Probable jurisdiction was noted by this Court May 20, 1946 (R. 334). This Court has jurisdiction by virtue of Section 2 of the Expediting Act of February 11, 1903 as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. § 29) and Section 238 of the Judicial Code as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. § 345).

Statement of the Case

A. The Complaint

It is alleged (R. 10) that National Lead Company, Titan Company, Inc., and E. I. du Pont de Nemours and Company combined and conspired to restrain and to monopolize trade and commerce in titanium compounds among the several states of the United States and with foreign nations and have been parties to contracts, agreements, and understandings in restraint of such trade and commerce in violation of Sections 1 and 2 of the Sherman Act.* It is charged (R. 11-12) that the combination and conspiracy has consisted of a continuing agreement and concert of action

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* SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 2 (1940).

among the defendants and co-conspirators, the terms of which have been that

(*a*) The United States market was to be allocated to defendants National and du Pont as their exclusive territory for the manufacture and sale of titanium compounds;

(*b*) The markets of the world outside the United States were to be allocated among defendants and co-conspirators by reserving certain markets as the exclusive territory for the manufacture and sale of titanium compounds to some of them, and by fixing quotas which certain of them were to be permitted to sell in other markets;

(*c*) National and du Pont and customers purchasing from them were not to export titanium compounds from the United States except to South and Central America;

(*d*) Domestic manufacturers other than National and du Pont were to be prevented from exporting titanium compounds from the United States;

(*e*) The foreign co-conspirators and customers purchasing from them were not to import titanium compounds into the United States;

(*f*) The foreign co-conspirators were not to manufacture and sell titanium compounds in the United States;

(*g*) The foreign co-conspirators were not to license under their patents any persons, except National and du Pont, to manufacture and sell titanium compounds in the United States;

(*h*) All persons were to be prevented from engaging in the manufacture and sale of titanium compounds in the United States, except with the consent of National and du Pont;

(*i*) All present and future patents, owned or to be acquired by the defendants and the other Allied

companies, relating to the manufacture and sale of titanium compounds were to be pooled in such manner that National and du Pont would receive licenses exclusive of all others under all such United States patents, present and future, owned by the Titan companies; each Allied company would grant to each Titan company an exclusive license under all such patents, present and future, owned or to be acquired by such Allied company for use in the territory allotted to such Titan company; National would grant to du Pont a license exclusive of all others except National under all such United States patents, present and future, owned or acquired by National; and du Pont would grant to National a license exclusive of all others except du Pont under all such United States patents, present and future, owned or to be acquired by du Pont.

The Government contended (R. 39-40):

(*a*) That all the contracts to which National Lead Company or Titan Company, Inc. were parties were unlawful and that their performance should be enjoined;

(*b*) That the defendants had combined and conspired to restrain foreign and domestic trade and commerce in titanium compounds in violation of Section 1 of the Sherman Act;

(*c*) That the defendants had combined and conspired to monopolize trade and commerce in titanium pigments in violation of Section 2 of the Sherman Act;

(*d*) That the court should perpetually enjoin the defendants and their representatives from combining and conspiring or agreeing to restrain and monopolize trade and commerce among the states of the United States or with foreign nations with

respect to titanium compounds, and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships, or understandings having the purpose or effect of continuing, reviving, or renewing any of the violations of the Sherman Act;

(*e*) That the court should order the defendants to grant upon the request of any third person a royalty-free license to make, use, or sell any invention or inventions which defendants had used in carrying out the alleged illegal agreements and to furnish such third person all technical information appropriate to practice said invention.

B. The Judgment

Finding that National Lead Company, Titan Company, Inc., and E. I. du Pont de Nemours and Company had violated Section 1 of the Sherman Act and that the Government was entitled to a decree which would restore titanium to the system of free competition and destroy the means of preventing such competition (R. 222), the District Court by its judgment (R. 308-16)

1. Held the agreements to be unlawful under Section 1 of the Sherman Act, cancelled the agreements, and enjoined the defendants and any other person acting or claiming to act through or for them from the further performance of any of the provisions of the agreements.

2. Enjoined the defendants from

   (*a*) Entering into, adhering to, or claiming any rights under any contract, agreement, undertaking, plan or program among themselves, the co-conspirators or with any other person, partnership or corporation which has as its purpose renewal of any of the agreements;

(*b*) from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan, or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect

(*i*) to divide sales or manufacturing territories,

(*ii*) to allocate markets,

(*iii*) to limit or prevent United States imports or exports,

(*iv*) to grant any third party any market as its exclusive territory,

(*v*) to keep any third party out of any market.

(*c*) from restricting any producer of titanium pigments in the use thereof.

3. Ordered the defendants to grant any applicant a non-exclusive license on a reasonable royalty basis under any existing United States patents and any patents issued to them within a period of five years from the date of the Final Decree and, also for a period of five years, under any patent under which they become exclusive licensees with the right to grant sublicenses. Such grant may, at the option of the licensor, be conditioned upon a reciprocal grant by the applicant under any titanium patents owned by the applicant. During a period of three years from the date of the decree such license or reciprocal license may at the option of either party contain a provision for the imparting in writing, at a reasonable charge, of the methods and processes used by the licensor at the date of the license in its commercial practice and under the licensed patents in connection with the production of titanium pigments.

4. Ordered the National Lead Company and Titan Company, Inc. to present within one year from the date of the Final Decree to the court for its approval a plan for divesting themselves of their stockholdings and financial interest, direct or indirect, in certain foreign companies, or for the purchase of the entire stockholdings or other financial interests in said companies,—the plan to provide for its completion within two years from the date of the Final Decree.

5. Enjoined the defendants from bringing or threatening to bring any action against any person or corporation for the infringement prior to the date of the Final Decree of any patents as defined in the Final Decree.

A stay of certain paragraphs of the final judgment was granted by Mr. Justice Reed of this Court January 2, 1946.

C. Summary Statement of Defendants' Position

A brief preliminary statement of our position may be helpful:—

The Government's case was based on a series of closely related agreements made between 1920 and 1944. The agreements have been cancelled and continuation or renewal has been enjoined. The appeals are greatly simplified by the fact that we accept the cancellation and the injunction against continuation or renewal. We submit, however, that the court went too far in forbidding normal and usual contractual arrangements.

By reason of corporate changes and stock acquisitions (for example, National acquired the stock of the Norwegian company with which the basic 1920 agreement was made), the amendment and cancellation of agreements, the termi-

nation of agreements and relationships and change of conditions brought about by the war, legal questions presented by the agreements of 1920-44 are *now* mostly moot or insubstantial,—and we do not discuss such questions on these appeals. The agreements are important, however, as the principal legal events in the creation and development of the industry, and thus as indicating the form the judgment should take. For that reason they are described in our statement of facts (pages 11-49), which is taken largely from the trial court's findings (R. 234-306).

We do object to certain provisions of the judgment, as follows:

Paragraphs 1, 2, 3, and 4 consist solely of definitions and a list of abbreviations used to identify the defendants and co-conspirators (R. 309-10). No objection is made to these paragraphs.

Paragraph 5 cancels the agreements listed therein and enjoins further performance of any of the provisions of the agreements and of any agreements amendatory thereof or supplemental thereto (R. 310-12). No objection is made to the cancellation of the agreements. Objection is made to the injunction against further performance of any of the provisions of the cancelled agreements or any agreements amendatory thereof or supplemental thereto. We believe that this language is too sweeping in its effect and that these defendants should not be restrained in perpetuity from making normal and usual arrangements with other producers of titanium products.

Paragraph 6 enjoins and restrains the defendants and all persons acting for them from entering into any plan or understanding among themselves, the co-conspirators, or

with any third party which has as its purpose or effect the continuing or renewing of any of the provisions of the agreements cancelled in paragraph 5 or any new plan or agreement which has as its purpose or effect (*1*) to divide sales or manufacturing territories, (*2*) to allocate markets, (*3*) to limit or prevent United States imports or exports, (*4*) to grant to any third party any market as its exclusive territory, and (*5*) to keep any third party out of any market. Normal and usual arrangements between any defendant and its own directors, officers, employees, agents, subsidiaries, or any dealer or distributor, whether or not a co-conspirator, are exempt from subdivisions (*1*) through (*5*) (R. 312-13). No exception is given to such relations between producers of titanium products. Our objection to this paragraph is similar to our objection to paragraph 5. It is too broad in that it perpetually enjoins these defendants from entering into normal and usual arrangements among themselves and with other titanium producers. We do not object, of course, to an injunction against illegal provisions of the cancelled agreements or illegal provisions in new agreements.

Paragraph 7 orders the defendants to grant non-exclusive licenses on their patents (as defined in paragraph 4) to any applicant, including a defendant or co-conspirator, at a uniform, reasonable royalty. Such licenses may be conditioned on a reciprocal grant by the applicant of licenses under any titanium patents owned or controlled by the applicant. The defendants are also ordered (for a period of three years) to impart to their licensees in writing, at a reasonable charge, methods and processes used in their commercial practices. Jurisdiction is reserved to pass upon the reasonableness of any royalty or charge directed to be reasonable (R. 313-14). We shall argue that the facts of this case require royalty-free licensing of the patents as

defined. This case is distinguishable from *Hartford-Empire Co. et al.* v. *United States*, 323 U. S. 386 (1945); in order to give full force and effect to the District Court's opinion, findings, and conclusions royalty-free licensing is essential.

Paragraph 8 orders these defendants to present to the court within one year from the date of the judgment a plan for divesting themselves of their interests in BTP, CTP, TG, and TK or in the alternative to purchase the entire stock or financial interests in said companies or any of them. The plan is to provide for its completion within two years from the date of the judgment (R. 314). Our objection to this paragraph is based on practical considerations such as tariffs, import licenses, government subsidies, and the extreme hardship imposed on National and Titan without any compensating gain to the Government or the public. The District Court refused to give any weight to economic factors, holding that this was a matter for the Congress and not for the courts (Opinion, R. 208).

Paragraph 9 is concerned solely with du Pont, except that it enjoins the defendants from bringing or threatening to bring an action for past infringement of any of the patents as defined in paragraph 4 (R. 314-15). No objection is made to this paragraph.

Paragraphs 10, 11, 12, and 13 are the usual visitation, costs, and reservation of jurisdiction clauses (R. 315-16). No objection is made to these paragraphs.

The judgment should be affirmed in so far as the court refused to grant divestiture of any part of the domestic titanium business of the defendants.

D. Statement of Facts

1. The Origin and Nature of the Business Involved

This case involves the creation of a new industry which, in a relatively short time, at steadily decreasing prices, has developed an important commodity, namely, titanium pigments (Finding 33, R. 246; Opinion, R. 207; Exs. NL 23, 24, Vol. IV, pp. 3948, 3949).

Titanium, the ninth most abundant element on the earth's surface, is contained in ilmenite and other minerals. Sand and rock formations containing ilmenite are found in India, the United States, Norway, Brazil, and elsewhere throughout the world (Finding 33, R. 245).

In and before 1920 there was no substantial trade or commerce in, and no commercial manufacture of, titanium pigments for use in paints, paper, rubber, or other products; pigments used for such purposes were lithopone, white lead, and zinc oxide. The use of metallic titanium in alloys was, however, under development by the Titanium Alloy Manufacturing Company (hereinafter called Alloy) at Niagara Falls, N. Y., and chemists engaged in that work (principally Barton and Rossi) were aware of the possibilities of titanium dioxide (hereinafter sometimes called TiO_2) as a pigment. Several important patents on processes and products had been taken out by them and a subsidiary, Titanium Pigment Company (hereinafter called Pigment), had been formed by Alloy to engage in further research, development, and promotion in the pigment field (Finding 33, R. 245-7).

Before 1920 tests and demonstrations conducted by Pigment had attracted the attention of large manufacturers of pigments and paints—Pittsburgh Plate Glass (paints), New

Jersey Zinc (pigments), the defendant du Pont (pigments and paints), and the defendant National (pigments). Of this group, National alone was sufficiently interested to invest in this new enterprise, and in 1920 purchased 10% of the stock of Pigment, securing at the same time an option to purchase up to 50% (Finding 33, R. 246).

The feature of TiO_2 that attracted the interest of chemists and paint manufacturers was its relatively high capacity to impart opacity and color (referred to as hiding power and tinting strength) to compositions treated (R. 853-4, 913-14). It was foreseen by Pigment and National before 1920 that if titanium pigments of good quality (that is, durable and satisfactory as to color and texture) could be manufactured economically, a substantial market could be created, and that to a large extent titanium pigments would be used in place of lithopone, white lead, and zinc oxide. In less than twenty years this vision was realized (Ex. NL 24, Vol. IV, p. 3949).

The chemists employed by Pigment at Niagara Falls had made small quantities of relatively pure TiO_2 before 1920. They believed, however, that manufacture of the pure product on a commercial scale would be costly in relation to other pigments, and they endeavored, therefore, to perfect processes for manufacture of "composite" pigments (that is, pigments containing TiO_2 and relatively large amounts of sulphates, such as barium sulphate or calcium sulphate and other less expensive materials) having hiding power and tinting strength per unit that, though not so high as pure TiO_2, would substantially exceed the hiding and tinting capacity of the other pigments then in use (R. 849-58). By 1920 process and product patents for titanium pigments developed by these chemists had been

granted in the United States, Norway, England, France, and other countries (Ex. NL 2, Vol. IV, p. 3822).

While the research and experimental work described above was going on in the United States, Gustav Jebsen, a Norwegian chemist and businessman, was making a similar investigation, albeit along different lines, in Norway—this in connection with his search for means of putting to industrial use large deposits of Norwegian ilmenite-bearing ore. By 1920 Jebsen and his associates had perfected processes patented in Norway, the United States, England, Germany, and in other countries, an important feature of which was disclosure of means for producing relatively pure TiO_2 pigments by direct application of relatively small quantities of sulphuric acid—a process much less costly than that then developed and in use experimentally at Niagara Falls. Though the Norwegian chemists were aware of the possibilities of "composite" pigments, they had not perfected processes for the manufacture of such products. In 1920 the process and product patents of Jebsen and his associates were held by Titan A/S, a Norwegian company (Finding 33, R. 246-7; R. 913-18). As early as 1914 Pigment had some knowledge of the work of Jebsen and his associates, and the latter were aware that processes were being developed in the United States. In 1914, while he was in the United States on other business, Jebsen conferred with the president of Alloy and Pigment with a view to the sale of Norwegian ilmenite and to the exchange of patents and technical information (R. 914-15). Owing to World War I, there was no further consideration of such exchange or cooperation until 1920; and during the war development work at Niagara Falls was at a standstill, though research and some experimental work and promotion were carried on (R. 868-9).

2. Commercial Developments in the United States (1920-1944)

In 1920 Pigment and Titan A/S made an agreement (described in detail below) whereby the American company was exclusively licensed under the Norwegian-owned patents for North America, with the right to grant sublicenses, and the Norwegian company was similarly licensed under the American patents outside North America. On the basis of this agreement, and utilizing the Norwegian as well as its own United States patents, Pigment (then and thereafter financed and in 1936 fully acquired by National) undertook a program for the development and promotion of titanium pigments as an economical and otherwise desirable substitute for the pigments then on the market (R. 876, 1054-66). That this program was commercially well conceived and executed is established by the fact that sales by Pigment (succeeded by National in 1936) steadily increased from 500 tons (in terms of TiO_2 content) in 1920 to 76,788 tons in 1944, while the price steadily dropped from 40¢ a pound in 1927 for TiO_2 (and correspondingly lower for "composite" pigments) to 14½¢ in 1944, and by the fact that in 1943 sales of titanium pigments by National alone exceeded sales of lithopone, zinc oxide, and white lead by all companies (Exs. NL 23, 24, Vol. IV, pp. 3948, 3949).

Increasingly aware of the possibilities of titanium pigments, by 1933 du Pont had obtained rights under the Blumenfeld patents (hereafter described) which disclosed processes having certain substantial advantages in respect of manufacture of pure TiO_2 over the Barton-Jebsen patents, but were not sufficient to permit use of the economical direct sulphuric acid attack or for manufacture of composite pigments. After a period of negotiations,—and in view of continued fear of prolonged, costly, and wasteful

patent controversy,—du Pont and National exchanged licenses. Du Pont thereupon adopted an aggressive development and promotion program, which was so successful that the company enjoyed a steady growth in sales; by 1935 it had captured almost 50% of the total United States sales of titanium pigments (in terms of TiO_2) (Ex. 41, Vol. I, p. 41).

Licensed by du Pont and National, American Zirconium Company entered the field in 1935. In 1937 Virginia Chemical Company entered the business, with a license from du Pont but not from National (Findings 31, 32, R. 244-5; Exs. H, H2, I, L, Vol. I, pp. 260, 277, 282, 397).

At no time were there imports of any consequence from abroad. In and after 1922 the tariff applicable to titanium compounds was 30% *ad valorem* (Finding 43, R. 251).

3. The 1920 Agreement

A minority stockholder of Pigment with an option to purchase up to 50% of the stock, National was unwilling to make further investment or commitments for development and promotion of titanium pigments unless and until it was satisfied that Pigment was in a position to use the Jebsen (as well as the Barton-Rossi) processes without risk of litigation (R. 919), and, accordingly, at the instance of National, Jebsen came to the United States in 1920 for the purpose of negotiating an agreement under which National would be free to practice the Jebsen inventions and Titan A/S would be free to make use of the inventions of Barton and Rossi (R. 918). The two sets of processes and patents were regarded by the parties as essential to development and manufacture on a satisfactory commercial scale of a line of titanium pigments comparable in respect

of possible uses, and superior in point of quality and economy, to the other pigments then on the market (R. 919, 870-2, 910-11). Accordingly, an agreement negotiated by McCarty, a vice-president of National, now dead, and Jebsen was executed July 30, 1920 on behalf of Pigment and Titan A/S (Ex. A, Vol. I, p. 1). As stockholders in Pigment, National and Alloy bound themselves in separate contracts with Pigment and Titan A/S to "respect" the principal agreement of July 30, 1920 and to communicate technical information, and they assigned all patents, inventions, and experiments in the "licensed field" to Pigment (Exs. A1, A2, Vol. 1, pp. 20, 24).

The features of the 1920 agreement essential to understanding of the case may be summarized as follows:

(*a*) The field within which licenses were, and technical information was to be, exchanged was defined as including all substances containing above 2% of titanium (unless such substances contained by weight more than 5% of a metal other than titanium in its purely metallic state) and all apparatus, methods, and processes useful in obtaining or manufacturing such substances (except as stated). The intention was to cover processes, substances, and apparatus in the titanium compound field. (R. 920)

(*b*) Pigment received "a license exclusive of all others including" Titan A/S in and for North America (defined as including the continent of that name, Central America, and Panama) under all existing or future patents of the Norwegian company, and Titan A/S was granted the same rights outside North America under the patents of Pigment. The parties agreed not to sell outside their respective territories, except that reciprocal non-exclusive rights of sale were reserved for South America. (R. 922)

(*c*) Detailed provision was made for exchange of copies of applications for patents filed by the parties or their licensees, and for the filing and payment of expenses incidental to the prosecution of such applications and maintenance of patents in territories outside the territory of each; and there was provision for assignment by each company to the other in case either party elected not to prosecute applications or maintain patents outside its territory. (R. 925)

(*d*) To implement the exchange of exclusive licenses, Titan A/S made Pigment the exclusive agent of Titan A/S for sales to Titan A/S in North America, such sales to be at prices and on terms determined by the agent, and Pigment similarly made Titan A/S its sole agent for sales by Pigment outside North America and South America. (With a view to "the widest possible development of titanium products in the 'Licensed Field'", it was agreed that, notwithstanding the agencies provided for, importations of "finished articles"—that is, paint, paper, rubber, glass, &c.—containing titanium products of the principal, its licensees or sublicensees, would be permitted provided such products did not constitute such an important part of such finished articles that sales within the agent's territory would substantially interfere with the agent's sales of its own titanium products. Written in 1920 before there was any trade or commerce in titanium pigments, much less in articles containing such pigments, this anticipatory restriction on sales of finished articles has always been a dead letter; it has never been applied, and has never had any importance or effect whatever.) (R. 926-7)

(*e*) It was the purpose of the parties, and especially of McCarty and Jebsen, that the exchange of licenses should promote the maximum development and practice of art; and to the end

(*i*) that the licenses received by each company would be fully utilized, and

(*ii*) that neither would be inclined or able to withhold information from the other, or make use of inventions or developments of the other for or in connection with further inventions or developments not fully shared with the other, it was agreed that each would impart semi-annually to the other full and accurate information in detail as to knowledge obtained in and applicable to the "licensed field", and would permit the other to inspect and study operations at its plants (exclusive of research laboratories). (R. 927)

(*f*) In line with the plans and purposes referred to the parties agreed that the reciprocal grants of exclusive licenses would be for sixteen years (to December 31, 1936), and thereafter for periods of ten years each, with provision for termination by notice to be given at least five years before the end of any such period; and it was agreed that upon such termination each would receive for itself and its licensees within its territory a non-exclusive license under inventions covered by existing patents or applications of the other, but that in other respects the obligations, liabilities, and benefits would cease. (Notice of termination has never been given.) (R. 927-8)

(*g*) In Article XIV of the 1920 agreement (mentioned by number because of its significance in connection with later agreements) it was provided that each company would have the right, so long as it held an exclusive license from the other under the 1920 agreement, to grant licenses under its own patents and sublicenses under the other's patents on condition, nevertheless, that every such licensee or sublicensee would

(*i*) grant to the party to the 1920 agreement other than its licensor patent rights in the "licensed field" identical in character, territorial scope, and duration to those given by its licensor to the other party to the 1920 agreement,

(*ii*) appoint such other party its sole agent as specified above in respect of its licensor, and

(*iii*) impart technical information to such other party in the same manner and to the same extent as its licensor. (R. 928)

The terms of the 1920 agreement reflected the desire of McCarty, on behalf of National, to establish a sound technical foundation for a new American industry and the desire of Jebsen, in the interest of Titan A/S, to secure the right to use the American inventions and to obtain the benefits of the vast technical experience, knowledge, and facilities of a large American company which had been engaged successfully for many years in the manufacture of pigments other than titanium pigments, without risking possible commercial competition by that company in areas outside North America in which Jebsen saw opportunities for development by his Norwegian company (R. 920-29). The agreement, based on exchange of patents and technical information, thus was intended to establish a relationship analogous to partnership, in which in the interest of the maximum development of a projected industry the participants would cooperate, would refrain from taking advantage of each other, and would guarantee that processes and information coming into the possession of one would be shared with the other (Ex. 244, 245, 248, Vol. II, pp. 1430, 1436, 1446).

The 1920 agreement was calculated to, and did, foster research, invention, and technical and commercial develop-

ments and resulted, in a relatively short period, in the manufacture and sale in large and steadily increasing amounts, and at steadily decreasing prices, of an important new commodity (Ex. NL 23, Vol. IV, p. 3948).

Between 1920 and 1927 Titan A/S suffered business and financial difficulties which led in 1927, at a time when I. G. Farbenindustrie, the German chemical combine, was negotiating for the purchase of its stock, then controlled by Norwegian banks, to purchase by National Lead of 87% of the stock of Titan A/S—Jebsen retaining 13% (Finding 47, R. 255). By 1932 National had acquired all of the stock of Pigment, and in 1936 acquired its assets and assumed its obligations (R. 929-30, 932-36). Since 1929 the rights and obligations of Titan A/S under the 1920 agreement have been held by defendant Titan Company, Inc., a Delaware corporation in which National now owns all the stock. (NL Answer, R. 48)

4. The French Agreement (1922-1927)

Between 1920 and 1927 commercial development was slow, even in the United States, where the resistance of manufacturers, painters, and other consumers to the new titanium pigments was less marked than it was abroad (Ex. NL 23, Vol. IV, p. 3948). (In 1921 Pigment sold 500 tons, in terms of TiO_2 content, and even in 1927 it sold only about 2,000 tons. In the latter year it was still selling at a loss, though prices were relatively high. This was possible only because National was financing the development by advances and purchases of stock (R. 873-4).) During the same period Jebsen faced serious difficulties in Europe. Using the Barton-Rossi patents, he introduced "composite" pigments which were much less expensive than the pure TiO_2 previously manufactured, but he endeavored with

little success to establish markets in Norway and Sweden, England, France, Holland, and Belgium; and by 1927, when National purchased 87% of Titan A/S, the capital of the Norwegian company was greatly reduced and it was heavily indebted to the banks (R. 929-30).

In France, where there was a tariff on titanium, Jebsen endeavored to work with local interests. He negotiated with one French group and then another with a view to manufacture in France under licenses similar to those held by Pigment and Titan A/S. It transpired that the first group was incapable of developing and promoting the new product and the second group gave up because they thought it would take too long to establish a market. Finally, Titan A/S and National purchased the second group's interest in Société Industrielle, a French company which had been and thereafter was used as the selling agency for pigments shipped from Norway or Germany. Titan A/S owned about 20% of the French company, National acquired an additional 58% which, in 1929, was transferred to Titan, and the remainder was held in France by the public (R. 930-32).

In a letter written to Société Industrielle in March 1927, Jebsen confirmed on behalf of Titan A/S a "Protocol" of May 1925 under which there was an exchange of licenses consistent in material detail with the exchange effected by the 1920 agreement described above (Ex. B, Vol. 1, p. 29). Subject to mutual obligations and restrictions like those assumed and imposed by the 1920 agreement, the French company received rights at the disposal of the Norwegian company for France, its colonies and possessions. It was stipulated that the exclusive licenses would remain in force until December 31, 1941, and thereafter for ten-year periods,

subject to termination by notice given at least six years before December 31, 1941, or before the expiration of any subsequent ten-year period. Notice of termination has not been given. In 1929 the rights of Titan A/S in the French agreement were transferred to Titan (R. 936-37). The hope that the French company would use its license from the Norwegian company to manufacture in France, thus contributing to the fund of processes and technical information available to Titan A/S and Pigment, was not realized. Société Industrielle served merely as a local selling agency for pigments produced elsewhere (R. 932).

5. The German Agreements (1925-1927)

After 1925 I. G. Farbenindustrie was the largest company in Germany—one of the largest chemical companies in the world—with vast interests and important connections throughout the world and especially in Central Europe. Its manufacturing resources and facilities and its research and sales organizations were unsurpassed anywhere. From Jebsen's point of view, IG was, obviously, a most important factor in entering the German market. He was fearful that IG would absorb his Norwegian company (IG was negotiating for the purchase of the Titan A/S stock held by certain Norwegian banks) and, knowing IG's power and reputation in Germany, he was interested when it approached him with a view to obtaining a license (R. 932-36). Jebsen knew that to succeed in his own enterprise he would have to come to terms with IG. German manufacturing conditions and costs were so favorable—sulphuric acid cost in Germany was one-half the cost in Norway or England—that Jebsen looked upon a connection with IG as affording a congeries of advantages, including vast research and development and sales facilities, capacity for

cheap manufacture for all or most of Europe, and a profitable market for large quantities of Norwegian ilmenite (R. 936). So confident were the Germans of their manufacturing capacity and costs that they offered, in consideration of a license, to buy Norwegian ilmenite at cost plus 30 to 50% (depending on the exchange rate) and to supply Titan A/S with titanium pigments at cost (R. 934). In 1924 or 1925 Jebsen had investigated another German company which had manufactured titanium pigments on a very small scale and which held certain patents but had concluded that the company's prospects were not of sufficient interest to warrant an association. There was no other manufacturer in Germany, and there was no demand by paint manufacturers and other consumers, who were accustomed to other pigments, including lithopone, manufactured by IG (R. 934).

Having saved his Norwegian company from purchase by the Germans, and having at the same time secured the backing of National, and believing that it would be impossible for him to undertake manufacture in Germany and sell in Germany and German-dominated territory without the cooperation of IG, Jebsen proceeded to negotiate a series of agreements, as follows (Exs. C-C8, Vol. 1, pp. 46-86):

(*a*) For the purpose of cooperating in the manufacture and sale of titanium and titanium compounds in Germany, Russia, Austria, Hungary, Czechoslovakia, Switzerland, Rumania, Serbia-Croatia-Slovenia, Bulgaria, Greece, Turkey, Japan, China, and Spain, Titan A/S and IG undertook to organize a German company, Titangesellschaft, to which each would contribute one half the initial capital. The parties were to have an equal voice in the selection of the "managers", but responsibility for policy and overall supervision was placed in the

hands of Jebsen and a representative of IG. It was stipulated that titanium compounds for sale in the countries referred to would be manufactured by Titangesellschaft, and that the parties would cover their total requirements in those areas from Titangsellschaft. It was agreed that Titangesellschaft could not be dissolved before the end of 1957, and then only on six months' notice; thereafter it could be dissolved on such notice at the end of any successive ten-year period.

(*b*) Further to secure the cooperation of IG, it was agreed that IG would grant Titangesellschaft an exclusive license, with the right to grant sublicenses, under all patents, methods, and experience of IG in the "licensed field" and would supply Titangesellschaft with copies of applications for German patents and, at the request and expense of Titangesellschaft, would prosecute similar applications in countries designated by Titangesellschaft; and it was agreed by Titan A/S and Titangesellschaft that they would exchange licenses and technical information and conduct their operations in and with reference to Germany and the other countries referred to in accordance with the principles of the 1920 agreement between Pigment and Titan A/S. (It was stipulated that Titan A/S might "substitute for itself" in these agreements another company or other companies in which Titan A/S and National, or either of them, were "engaged" 100%; and, subject to immaterial exception, Titan subsequently did take over the rights and obligations of Titan A/S.)

(*c*) In a series of ancillary agreements IG undertook

(*i*) to provide a factory site and building near its Leverkusen works (rent at 6% of the value of the building);

(*ii*) to furnish steam, gas, water, and electricity (at cost),

(*iii*) to supply transportation facilities (at reasonable prices), and

(*iv*) to deliver raw materials (at cost plus 10%, but not more than the competition charged, with provision for "most-favored" customer treatment). IG was appointed agent of Titangesellschaft for sales in the countries mentioned.

(*d*) Worthy of special reference as bearing on Jebsen's plan to advance as rapidly as possible the production and sale of high quality, economical titanium pigments,—that is, really to compete on the most favorable possible basis with other pigments,—and at the same time to build up a large and consistent market for Norwegian ilmenite, is

(*i*) the agreement of Titangesellschaft to satisfy its ore requirements by purchases from Titan A/S at cost plus 40-50% (stated in terms of Norwegian Gold Kroner, and favorable to Titan A/S because of exchange factors), and

(*ii*) in view of Jebsen's high costs and his intention to close down his Fredrikstad plant, the agreement of Titangesellschaft giving Titan A/S the right to take 50% of the pigments produced at Leverkusen at cost (and quantities in excess of 50% at cost plus 10%).

Titangesellschaft was organized and did operate in accordance with the agreements described. It purchased large quantities of ore from Titan A/S at a satisfactory price (R. 935). The conviction that it would be a fertile source of inventions and technical information useful in the United States and England particularly, as well as in Germany, was confirmed. Thanks to IG's 50% interest in

the company, Titangesellschaft was able to make use of IG's superb sales organization to push the sales of titanium pigments at the expense of other pigments (including lithopone made and sold by IG) in markets not accessible to National or Titan A/S. Its costs and prices were low, its quality high. The arrangement under which Titan A/S (Titan after 1929) was able to obtain pigments at cost proved to be of great value as soon as manufacture at Leverkusen was commenced, and especially in respect of sales in the British market, where Jebsen had been able to make limited headway with his high priced pigments and where there was no manufacture until about 1934 (R. 936).

All relations between National or Titan and IG or Titangesellschaft were terminated by the declaration of war in December 1941. National has written off its investment in Titangesellschaft; it will not resume or enter into agreements containing territorial restrictions; and its plans and ability to carry on business relations with German companies after the war depend entirely upon provisions to be made for German industry and trade by the Allied Governments (R. 937, 1106).

6. The British Agreements (1933)

I. G. Farbenindustrie A. G. was organized in 1925 as a merger of the largest chemical and dye producers of Germany. These producers had operated under a "Community of Interest Agreement" since 1916 and under various cartel agreements since about 1900 (Ex. NL 34, Vol. IV, pp. 4144-7). After 1928 the merged enterprise had capital in excess of \$250,000,000 (\$420,000,000 after devaluation of the dollar) (Ex. NL 34, Vol. IV, p. 4145). By virtue of excellence of management and resources, IG was the leading chemical enterprise of the world (*ibid.*). The weakness

of the British and Americans in chemical and dye stuffs had been demonstrated in World War I. Aware of this weakness, and alert to what was going on in Germany, the British decided to act. In 1926 they organized Imperial Chemical Industries, Limited, as an amalgamation, sponsored by the British Government, of the leading British chemical companies. With assets exceeding £100,000,000, I. C. I. was the largest manufacturer of chemicals in the British Empire and was intended to, and did, rival IG in respect of research, manufacture, and trade (Finding 17, R. 241) I. C. I. was the agency by which the British chemical industry sought to, and did, secure self-sufficiency and dominance throughout the Empire (Ex. NL 34, Vol. IV, p. 4123).

Jebsen had attempted for years to establish a British market for his pigments, but with limited success (R. 938). The traditional conservatism of the British manifested itself in the habits and attitude of paint manufacturers and master painters who were accustomed to pigments of domestic origin. "Buy British" was more than a slogan—it was a stubborn and formidable fact (R. 949). Knowing from costly experience that he could not hope successfully to invade, much less to capture, the British market without a strong local alliance, Jebsen set out to obtain one. Though I. C. I. had never manufactured pigments, it was, obviously, the most desirable British partner; for it had resources in the way of technical and chemical facilities, raw materials, &c., not possessed by any other firm (R. 939). Imperial Smelting Corporation, Limited, and Goodlass Wall and Lead Industries, Limited, were also natural allies. I. S. C. was the largest British manufacturer of zinc and lithopone; it could supply sulphuric acid; it had important connections throughout the Empire; and it had strong management friendly to National (R. 942). Goodlass Wall, a

government sponsored amalgamation of lead companies, was brought in for similar reasons (R. 939; NL Answer, R. 42).

In February and March, 1933 Titan, I. C. I., I. S. C., and Goodlass Wall entered into a series of agreements, as follows (Exs. F-F7, Vol. I, pp. 119-71):

(a) Based on factual premises as to patents and processes of Titan and a record of successful commercial manufacture in Germany and the United States, the right of manufacture and sale of titanium compounds throughout the British Empire (excluding Canada, Newfoundland, and certain other areas) was vested in a new company, British Titan Products, Limited; and I. C. I., I. S. C., and Goodlass Wall agreed that they would not deal in or manufacture such compounds except through or at the request of British Titan. Subject to restrictions on transfer, the voting shares of British Titan were distributed among Titan—49% (with the right to allot 5% to R. W. Greef & Co., Ltd., which had been the British sales agent of Titan A/S and, later, Titan), I. C. I.—17%, I. S. C.—17%, and Goodlass Wall—17%. Titan received the right to name three of the six directors, but it was stipulated that the chairman must be one of the directors named by the British shareholders. The agreement was for thirty years, with severely limited provisions for retirement.

(b) It was agreed by Titan and British Titan that they would exchange licenses, patent applications, and technical information, and conduct their operations in and with reference to the British Empire (excluding Canada, Newfoundland, and certain other areas) in accordance with the principles of the 1920 agreement above described (page 16).

(c) In order to vest in British Titan and Titan (and its licensees) all the benefits of their research and development, I. C. I., I. S. C., and Goodlass Wall each gave British Titan an exclusive license in respect of I. C. I.'s, I. S. C.'s, and Goodlass Wall's patents, processes, and subject matter within the "licensed field" (limited in the case of I. C. I. to titanium oxide or titanium pigments) for the production of titanium compounds, with the right to manufacture, use, or sell compounds so produced, and with the right to grant sublicenses; and each such grantor agreed that it would supply British Titan with copies of its applications for patents in the "licensed field" and, at the request and expense of British Titan, would prosecute similar applications in countries designated by British Titan.

(d) The 125,000 non-voting shares of £1 each of British Titan were allotted to Titan in consideration of its existing business and good will in the British Empire and its agreement to make available to British Titan all technical knowledge and experience at its disposal in the manufacture of titanium products or relating to the marketing thereof in the British Empire.

(e) The right of Titan A/S to buy 50% of the German production at cost (and more at cost plus 10%) having been transferred to Titan, the latter agreed until such time as British Titan commenced to manufacture, and for two years thereafter, to supply British Titan's requirements at cost.

Located near the I. C. I. factory at Billingham, and in charge of a former I. C. I. employee, the British Titan factory commenced operations in 1934 and has operated successfully ever since (R. 946). Plans were made for substantial increase of production after the war, and these

plans are now being put into effect. The choice of partners was most fortunate. Apart from inventions and technical facilities and information of great value, I. C. I., I. S. C., and Goodlass Wall have supplied management and sales experience and advice ~~of a~~ high order (R. 946).

In February, March, and April 1943 there were conversations between representatives of National Lead and members of the Antitrust Division, Department of Justice, relating to a proposed consent decree (Ex. NL 1, Vol. IV, pp. 3817-21). The conversations were suggested by the Division's pending investigation of the titanium pigments industry and antedated the indictment against the defendants herein and Messrs. Rockwell, Garesche, and Jebsen of National Lead, and another, returned in the Southern District of New York June 28, 1943. It was impossible to find a basis of agreement and the conversations were terminated. Thereafter the indictment (No. 114-455) was returned. Following the consent decree discussions with the Antitrust Division in the spring of 1943, there were conferences between the attorneys for National Lead and the president of the company (Rockwell) at which the Division's objections to certain contracts were discussed and consideration was given to the position of the company in respect of performance of and compliance with the contracts pending trial. Owing to the war production of the company, it was thought that no case would be tried during the war. It was the position of the president that in view of the probable delay it would not be prudent, and he did not desire, so far as it was practicable to avoid it, to permit the company to continue to operate in accordance with provisions which had been criticized by the Government; and the attorneys for National Lead were instructed to protect the company against the possible charge that it had persisted in a course of action after the

Government's objections had been made known and, if possible, to take steps to revise the contracts in such a way as to meet the objections and at the same time avoid unnecessary sacrifice of the company's investments and other interests. The basis of the Antitrust Division's criticism of National Lead, both in the indictment and in the complaint in this action (filed June 24, 1944), is the 1920 agreement between Pigment and Titan A/S. The agreement, containing certain restrictions objected to by the Antitrust Division, might have been terminated or relinquished in some way but for the fact that its terms had been carried over in part into contracts between National Lead and I. C. I., I. S. C., Goodlass Wall, and British Titan,—and also into Canadian agreements described below,—and that in such agreements certain provisions had been conditioned on the 1920 agreement. Because of the foregoing, the attorneys for National Lead concluded that they could best serve their client by formulating, and endeavoring to have the parties approve, further agreements between National Lead and the British and Canadian companies which would remove features of the agreements criticized by the Antitrust Division and, in particular, provisions based upon the existence and terms of the 1920 agreement. Substantial progress in this direction was made; and at a pre-trial conference in this case held October 30, 1944 counsel for National Lead tendered a form of contract agreed to, but not executed, by National Lead and the British companies. A copy of the proposed agreement was received in evidence at the trial (Ex. NL 30, Vol. IV, pp. 4066-72). The parties are I. C. I., I. S. C., Goodlass Wall, Titan, British Titan, and National Lead, and the agreement provides in substance as follows:

(a) Licenses exchanged by British Titan and National Lead (Titan) will be non-exclusive and royalty free, with the right to grant non-exclusive sub-

licenses but only to parties who will license British Titan or National Lead, as the case may be, on a non-exclusive, royalty-free basis under the patents and applications of such sublicensees.

(*b*) The licenses will be without restriction as to production, shipment, sale,, or use of titanium compounds; and it is provided that neither the 1933 British agreements nor the 1920 agreement will preclude British Titan or National Lead (or Titan) from manufacturing, selling, or using in, or from shipping from or to, any place in the world, titanium compounds or any product, finished or unfinished, or from otherwise fully exercising the grants made by them.

(*c*) It is agreed that the holdings of voting shares in British Titan will be rearranged so as to insure that National Lead (or Titan), I. C. I., I. S. C., and Goodlass Wall will each hold the same number of shares.

(*d*) The right of National Lead to name three directors of British Titan is cancelled, and National Lead has agreed to refrain from taking any part in or exercising any influence in respect of deliberations or decisions of British Titan concerning any business of British Titan within, from, or to the United States.

(*e*) All restrictions on the disposition by National Lead of its shares of British Titan contained in the 1933 agreements are cancelled, and it is agreed that the Articles of Association will be amended to remove therefrom all such restrictions.

(*f*) The proposed agreement supersedes, in so far as inconsistent therewith, the 1933 agreements, and to the extent that any provision or provisions of the 1933 agreements are inconsistent therewith they are deemed to be amended.

(g) The license agreement between Titan and British Titan made in March 1933 is cancelled.

(h) The agreement for exchange of licenses under patent rights hereafter acquired may be terminated by British Titan and National at the end of any year by three years previous notice in writing, or by National by notice given at any time pursuant to order of the United States District Court, or by British Titan by notice given at any time pursuant to order of competent authority in Great Britain pursuant to the Defense Regulations 1941 or pursuant to the order of any competent court in Great Britain.

The proposed agreement was negotiated and submitted in good faith as a means of meeting objections made by the Antitrust Division, and at the same time of avoiding litigation in England on claims that might be asserted against National Lead or Titan by the British companies, and of conserving National Lead's investment in British Titan.

British Titan was not the only manufacturer of titanium pigments in the British Empire. A small company, National Titanium Pigments, Limited, known as Laporte, having acquired rights under the so-called Tilden-Smith patents and under the Blumenfeld patents for the British Empire, entered into agreements with British Titan fixing prices in the British market excluding Canada (Exs. 675, 670, Vol. III, 2484, 2469). Though National was represented on the board of British Titan when these agreements were made, they were not made at the instance of Jebsen or National (or Titan) but were made by British Titan, acting independently, with reference to business and legal considerations respecting which neither National, Titan, nor Jebsen had responsibility or influence (R. 963). In view of war conditions existing in 1941, British Titan and

Laporte, with the support of the British Government, agreed upon a quota arrangement under which British Titan was assigned 80% and Laporte 20% of sales in the British market (Ex. F8, Vol. 1, pp. 173-7).

7. The European Agreements (1933-1935)

Joseph Blumenfeld, chemist and managing director of Société de Produits Chimiques des Terres Rares (Terres Rares), a French company in which he owned stock, prior to 1922 obtained certain patents relating to the manufacture of titanium compounds which he assigned to Terres Rares. Between 1922 and 1933 Terres Rares granted exclusive licenses to Fabriques de Produits Chimiques de Thann et de Mulhouse (called Thann), a French company, for France, its colonies, dependencies, protectorates, and mandated territories; to Societa Anonima Titanium (Montecatini), the largest chemical company in Italy, for Italy, and non-exclusive licenses for Belgium, Holland, Switzerland, Spain, Portugal, and South America, subject to rescission on three months' notice; to Verein für Chemische und Metallurgische Produktion Aussig (Aussig), the largest chemical company in Central Europe for Czechoslovakia, Austria, Hungary, Yugoslavia, Rumania, and, subject to certain obligations, Danzig and Denmark, and non-exclusive licenses for Poland and Russia; and to Laporte for the British Empire. Terres Rares sold its United States titanium patents to Commercial Pigments Company, a United States corporation; these patents were later acquired by du Pont (Finding 34, R. 247; R. 782-831, 951-3).

Jebsen, confronted with the economic and political problems indicated below, acting for Titan, either made or approved agreements among the European producers as follows:

(*a*) In 1933 Aussig and Titangesellschaft entered into an agreement which established a sales quota of approximately 25% for Aussig and 75% for Titangesellschaft in Germany, Czechoslovakia, Poland, Austria, Hungary, Yugoslavia, Rumania, and Russia. Prices were to be fixed by mutual consent, but not so high as to impair sales, and were not required to be identical, so that each firm could compete with dealers in other pigments (lithopone, zinc oxide, white lead, &c.) as local conditions might permit. Each gave the other the right to use its product patents and agreed to support the other in protecting these rights. Aussig agreed to buy from Titangesellschaft at preferential prices any requirements of titanium pigments above Aussig's then production capacity which Aussig might need to meet its quota. (This provision, made to enable Titangesellschaft to reduce costs through increased production and Aussig to buy at a favorable price, was effective only until Titangesellschaft's capacity was fully utilized.) Responsibility for the quality of the products was to rest on the manufacturer. (Ex. G, Vol. I, p. 178).

(*b*) Some time in 1935, but to take effect as of May 1, 1934, an agreement known as the Contrat a Quatre was made between Thann and Terres Rares on the one hand and Société Industrielle and Titan, on the other, which established a quota of 30% for Thann and Terres Rares and 70% for Société Industrielle and Titan in Belgium, Holland, and "various countries" (Esthonia, Latvia, Lithuania, Abyssinia, Liberia, Arabia, Afghanistan, Persia, and Siam) and a 50% quota for each group in France; prices for these territories were to be fixed by mutual consent; product patents of each party were to be made available to the others. This agreement could be terminated by a change of sales possibilities resulting from governmental meas-

ures, from "new competition", or from "any governmental or legislative measures making it partly or wholly illegal". Otherwise it could not be terminated before December 31, 1938, and then only on six months' notice. Thereafter it was to continue for two-year periods unless notice was given six months before the expiration of any such period. This agreement was related to the Contrat a Six (see below) and could be terminated on three months' notice if that agreement was terminated. (Ex. G1, Vol. I, p. 197)

(*c*) At the same time an agreement known as the Contrat de Livraisons (agreement concerning mutual deliveries) was made between the same parties and provided that each group would supply the other with any titanium pigments which it might have available after its own needs were satisfied, at certain fixed prices and on certain terms. It was agreed that goods delivered by one group to the other could not be reexported and that this obligation must be imposed on the customers of the parties. (Ex. G2, Vol. I, p. 221)

(*d*) An agreement known as the Contrat a Six was also entered into at this time by Thann, Terres Rares, Montecatini, Titan, Société Industrielle, and Titangesellschaft, in which Titangesellschaft and Aussig were given exclusive rights of sale and delivery in Germany, Danzig, Czechoslovakia, and Russia; Titangesellschaft, Terres Rares, and Thann in Spain, Portugal, Japan, Switzerland, Bulgaria, Greece, Turkey, China, and South America (subject to Titanium Pigment's rights in South America); Terres Rares, Thann, and Société Industrielle in France; Terres Rares, Thann, and Titan in Belgium, Holland, and "various countries" (as defined above); Montecatini in Italy; Titan in Norway, Sweden, and Finland; and Titan and Aussig in Denmark. Each party

agreed to respect the others' exclusive rights. This agreement had the same termination provisions as the Contrat a Quatre, and was terminated by Montecatini on December 31, 1938. (Ex. G 3, Vol. I, p. 233)

The European agreements and arrangements just described were shaped by political, economic, and legal considerations which may be briefly stated as follows: In 1927 a world economic conference was called by the League of Nations for the purpose of discussing and, if possible, taking steps to cure the economic ills of Europe caused by World War I. For example, the industries of Bohemia, established for a market of 50 million people, found themselves with 13 million Czechoslovakians as their domestic market; they had to seek an outlet for excess production. Tariff barriers were erected and import license systems inaugurated to protect domestic manufacture; and countries with weak currency subsidized export industries in order to bolster their currency. These economic complications, characteristic of Europe in the 20's and 30's, led to cartelization to protect domestic industry, including the prevention of dumping by companies subsidized by their governments. A company wishing to do business in Europe at the time was forced to come to terms with domestic industry and thus to participate in cartel agreements (R. 1127-9, 954-5, 798; Ex. NL 34, pp. 4108-72).

8. The Japanese Agreements (1936)

Because of increasing difficulty with Japanese tariffs and import licenses, and because of the probability of independent manufacture of titanium products in Japan and dumping on world markets, a pool agreement was made in 1936 by Terres Rares, Titan, and IG, under which Terres

Rares and Titan, together with the Japanese firm of Kokusan Kogyo, undertook to form a new company, Titan Kogyo, for the purpose of erecting a titanium factory in Japan (Ex. J, Vol. I, p. 292). The Japanese firm was to own 50% of the new company, Terres Rares 30%, and Titan 70% of the remaining 50%. IG was to have an option on one-half of Titan's shares. Terres Rares and Titan authorize Doitsu (IG's selling agency in Japan) to act as trustee for them in the new Japanese company. This agreement was to last as long as any of the parties owned stock in Titan Kogyo. The proportionate interests of the parties in the Japanese market had been determined by the European agreements described above (page 34).

Doitsu and Kokusan Kogyo agreed that Titan Kogyo would be licensed under Titangellschaft and Titan Japanese patents in substantially the same manner and subject to the same terms as in the German and British agreements described above (pages 22, 26) (Exs. J1-J8, Vol. I, pp. 290-341). Titan Kogyo was given an option on Blumenfeld's Japanese patents in exchange for certain rights to be given Terres Rares and Thann (Finding 54, R. 264-6).

9. The Canadian Agreements (1937)

National, under certain Canadian patents and by virtue of the 1920 agreement described above (page 16), had an exclusive license and the right to grant sublicenses under Titan A/S's Canadian patents (Ex. A, Vol. I, p. 1).

Before 1937 National supplied the Canadian market through Wilson, Paterson & Gifford and permitted British Titan to sell through the same agency (Exs. 674, 649, Vol. III, pp. 2481, 2416). Sales were small and the market undeveloped in relation to rival pigments, such as lithopone,

white lead, and zinc oxide. Beginning in 1935 National, realizing the need for a strong local alliance, began negotiating with Canadian Industries, Ltd., called C. I. L., the largest chemical company in Canada, 86% of whose stock is owned by I. C. I. and du Pont in equal shares, for the purpose of forming a company to manufacture and sell titanium pigments and compounds in Canada. As a result of these negotiations four agreements were made in 1937, as follows (Exs. K-K 3, Vol. I, pp. 342-80):

(*a*) There was an agreement between C. I. L. and National Lead under which a new company, Canadian Titanium Pigments, Ltd., was granted the sole right to manufacture and sell under C. I. L.'s and National Lead's titanium patents in Canada and Newfoundland. Canadian Titan was to be owned 49% by National Lead and 51% by C. I. L. In addition, National Lead was to receive 8,000 shares of non-voting (except under certain conditions) $100 par value stock in consideration of its existing good will, patents, and technical information. National Lead and C. I. L. agreed to subscribe to bonds of Canadian Titan for the purpose of erecting a factory; but because of World War II the bonds have not been issued and the factory has not been built. Canadian Titan was to have six directors, three nominated by National Lead and three by C. I. L.; one of the C. I. L. directors was to be president. Until the factory was built, National agreed to supply Canadian Titan at cost plus 10% and to use its best efforts to enable Canadian Titan to purchase from British Titan at cost plus 10%. The agreement was to remain in force for thirty years, and thereafter could be terminated on twelve months' notice by either party. If at the end of thirty years either party wished to withdraw from the agreement, it was required to offer its shares

to the other party at book value. (In determining book value good will, patents, and future earnings were not to be considered.)

(*b*) It was agreed that National Lead and Canadian Titan would exchange licenses, patent applications, and technical information in accordance with the principles of the 1920 agreement above described. No restrictions were placed on the sale of finished products by the customers of either party. Both National and Canadian Titan could grant sublicenses; and in order to insure the widest development of the field, sublicensees were required to grant licenses under their present and future patents to the grantor.

(*c*) C. I. L. and Canadian Titan entered into a similar agreement.

In 1937 Canadian Titan entered into a contract with Laporte under which Laporte transferred to Canadian Titan all the Canadian Titan patents which it then owned and further agreed to license Canadian Titan under any such patents which it might acquire during the life of the contract (fifteen years) (Ex. K 4, Vol. I, p. 382).

Before the trial negotiations were in progress among National, C. I. L, and Canadian Titan to revise the Canadian agreements on lines similar to the revised British agreements described above (pages 31-3) (Finding 58, R. 37). National has recently, however, agreed to buy all of C. I. L.'s interest in Canadian Titan.

10. The du Pont Agreements (1931-1941)

Before 1931 the United States rights under the Blumenfeld patents were held by Commercial Pigments Company (page 34 above); from 1931 to 1935 by Krebs Pigment and

Color Corporation, a Delaware company owned 70% by du Pont; after 1935 by du Pont, to which manufacturing assets of Krebs were assigned in 1935. Krebs was dissolved in 1943, and since then du Pont has conducted all its titanium pigments operations through its Pigment Department (DP Answer, R. 54).

Between 1920 and 1931 sales of titanium pigments by National slowly but steadily increased. In 1931 National sold 8,000 tons of titanium pigments in terms of TiO_2 content (Ex. NL 23, Vol. IV, p. 3948). While sales of all pigments declined in the depression year 1932, sales of titanium pigments fell off relatively little, and sales by National of titanium pigments exceeded total sales of white lead by all manufacturers (Ex. NL 24, Vol. IV, p. 3949). Titanium pigments were well on the way to overtake zinc oxide and even lithopone.

Engaged in the pigments and paint business on a large scale, du Pont saw the handwriting on the wall and set out to acquire patent rights and technical information necessary to manufacture efficiently and economically a full line of titanium pigments and thus to compete successfully with National in a potentially large domestic market (Exs. 192, 172, Vol. I, pp. 1114, 965).

Looking into the patent situation, du Pont found that the Blumenfeld patents, though important, were incomplete and inadequate. For example, the Barton-Rossi-Jebsen patents held or controlled by National stood in the way of manufacture of composite pigments, for which there appeared to be a substantial potential demand, and of use by Krebs (du Pont) of the cheap sulphuric acid attack, disclosed by Jebsen, in the making of pure TiO_2. Indeed, du Pont found that Commercial Pigments was then infring-

ing patents held or controlled by National, and that plans then under consideration for more extensive operation would, if carried out, entail further infringement (Exs. 207, 210, 213, 214, 215, 216, Vol. II, pp. 1252, 1283, 1293, 1295, 1300, 1309, 1313). It was not all one way, however, for the Blumenfeld patents disclosed processes which were attractive to National. National was particularly interested, for example, in processes disclosed by Blumenfeld which improved the quality of TiO_2. And it was seriously claimed by du Pont that National was infringing some of the Blumenfeld patents (Exs. 207, 210, 211, 213, 214, 215, 216, Vol. II, pp. 1252. 1283, 1293, 1295, 1300, 1309, 1313).

The record is replete with evidence of serious controversy between National and du Pont over patent rights, of the probability of protracted and costly litigation, and of a desire on the part of the two companies to effect a reasonable settlement of their difficulties in order that both might safely go forward on a sound technical basis with the development, manufacture, and sale of a relatively new product (Ex. 177, Vol. I, p. 986; Ex. 196, Vol. II, p. 1144).

Having decided to settle their differences and to release and expand the art rather than to attempt to destroy each other, National and du Pont, through Pigment and Krebs, entered into an agreement as of January 1, 1933 as follows (Ex. E, R. 69-72):

(*a*) They exchanged irrevocable, non-exclusive licenses, within the United States, to use all processes, methods, and apparatus relating to or in the "licensed field", whether or not patented or subject to patent, then or thereafter owned by them or otherwise at their disposal, with the right to sell products resulting from the exercise of such licenses in the United States, its colonies and possessions, Mexico,

Central America, the West Indies, and South America.

(b) They agreed to exchange technical information and experience.

(c) Each party agreed to assist the other to acquire an irrevocable, non-exclusive license, for the territory above described, under any patent or applications owned by or otherwise at the disposal of other persons, under which such party itself was licensed; and Krebs (du Pont) agreed that it would offer to any foreign associate of Pigment (National Lead or Titan), before offering to any other person, the opportunity to acquire, upon mutually satisfactory terms and conditions, an irrevocable, non-exclusive license under any patent relating to the "licensed field" issued in any country of Europe or in Great Britain which then was or thereafter might be owned by or otherwise at the disposal of Krebs (du Pont).

(d) It was provided that the agreement might be terminated at any time after December 31, 1933 on three years' notice, but not so as to affect licenses theretofore acquired.

(e) There was a mutual release of claims for infringement.

As of about May 1, 1940 the exchange of technical information between National and du Pont was discontinued; and the 1933 agreement was amended as of January 1, 1941 to eliminate provisions for exchange of technical information (Ex. E 3, Vol. I, p. 112).

In each of the years 1937 to 1941, inclusive, du Pont and Titan entered into patent agreements involving specifically designated inventions under the terms of which du Pont granted to Titan exclusive licenses, with the right

to grant sublicenses to one or more of the following, namely, Titangesellschaft, British Titan, Société Industrielle, and, from 1939 to 1941, inclusive, to Titan Kogyo, under certain specific patents and patent applications of du Pont in certain specified countries other than the United States relating to the manufacture of titanium compounds useful as pigments. Each of said licenses was for the particular countries in which the licensed patents and applications were issued or pending, du Pont reserving the right to use the inventions covered by such patents; and Titan, with the consent of National, granted du Pont non-exclusive licenses under certain specific United States patents and applications (Exs. M, N, Q, R, S, Vol. I, pp. 406, 412, 455, 470, 486).

The 1933 agreement between National and du Pont involved a substantial, material deviation from the principles and terms of the 1920 agreement between Pigment and Titan A/S, in that, in addition to granting licenses to du Pont under United States patents of National, the 1933 agreement granted sublicenses to du Pont under United States patents of the parties to the French, German, and British agreements, without at the same time securing the agreement of du Pont not to manufacture in or import into such territories. It was necessary, therefore, to secure the approval of the 1933 du Pont agreement by the parties to the French, German, and British agreements, and such approval was obtained (Exs. A, E, Vol. I, p. 1, R. 69; Opinion, R. 213-14; Finding 73, R. 280-9).

The 1933 du Pont agreement was negotiated chiefly by Rupprecht for du Pont and by Beschorman for National Lead. Rupprecht died prior to the trial (R. 1152). Owing to his retirement, illness, and residence in California,

Beschorman was not called to testify at the trial (Exs. 7, 13, Vol. I, pp. 504, 513). Letters written by Rupprecht and Beschorman, however, indicate that, while Rupprecht informed Beschorman that in view of patent and commercial considerations du Pont was not likely to manufacture in or import into the foreign territories of National Lead's associates, du Pont would not, and was advised and believed that legally it could not, agree to refrain from such manufacture or importation (Exs. 267, 273, Vol. II, pp. 1483, 1500).

While Jebsen had been notified by representatives of National of the negotiations with du Pont, his office and residence were in Paris, his authority and responsibility were confined to European operations in which Titan was interested, he did not participate in the negotiations with du Pont, and he was not asked to and did not approve the form of agreement with du Pont. Indeed, Jebsen regarded the proposed du Pont agreement as a radical and unfortunate departure from the principles and terms of the 1920 agreement, and so advised National (Exs. 242, 244, 245, 247, Vol. II, pp. 1419, 1430, 1436, 1445).

After the 1933 du Pont agreement had been negotiated, however, Jebsen was instructed by National to secure the approval thereto of the French, German, and British companies, and, recognizing but not approving the deviation referred to, he proceeded to carry out the instruction. Jebsen did not receive, nor did he understand that National had received, any assurance that notwithstanding the terms of the agreement du Pont had accepted the principles and terms of the 1920 agreement, or had agreed or would agree to refrain from manufacture in or importation into the territories referred to. Never at any time—not in 1933,

or 1938, or at any other time—did Jebsen understand that du Pont had accepted the principles or terms of the 1920 agreement (R. 959-63, 986-1052; Exs. 273, 274, 275, Vol. II, pp. 1495, 1502, 1504).

On the basis of the exchange of licenses and technical information between National and du Pont, from 1933 on there was the most active competition between the two companies—resulting in great improvement in manufacturing processes, a vast increase in sales, and repeated reductions in the price of titanium pigments (Finding 78, R. 290; Opinion, R. 207; R. 1065-7, 1155-61).

While for obvious business reasons National and du Pont have endeavored to match each other's titanium products, such products have never been identical and each manufactures certain titanium pigments having special applications not manufactured by the other (R. 1073-75).

There has never been any allocation of territory or customers between National and du Pont; and, indeed, each maintains a large, highly trained technical sales force engaged in endeavoring to capture the market for titanium pigments. To a very large extent the salesmen of the two companies are chemists whose contact with customers—that is, manufacturers of paint, rubber, glass, &c. —consists in demonstrating that their products merit acceptance on the basis of technical superiority. The buyers of titanium pigments are mainly well-informed, experienced purchasing agents, whose orders are placed solely on the basis of service and technical considerations brought to their attention by chemists and other technicians employed by the consuming companies (Finding 78, R. 290-1; R. 1155-62; 1053-69).

While National and du Pont have followed each other's price reductions on their commercially comparable products, such price following has been competitive and not collusive, and has resulted in repeated, substantial reductions of the price of titanium pigments (R. 1167, 1066, 1072-3).

11. American Zirconium Agreements (1934-1944)

In or about 1934 American Zirconium Company, which was owned 50% by Glidden Company and 50% by Metal & Thermit Corporation, began to manufacture TiO_2. National notified Zirconium that it was probably infringing patents owned or controlled by National, and in consequence Zirconium requested and received from National a license under all United States patents owned or controlled by National (Exs. H, H1, H2, Vol. I, pp. 260-81). National and Zirconium each granted the other a non-exclusive license under its existing and future patents in the "licensed field"; Zirconium agreed to license National, its licensees or sublicensees, under any present or future foreign patents of Zirconium; and in other respects the agreement conformed with the requirements of Article XIV of the 1920 agreement between Pigment and Titan A/S. At the request of Zirconium, National accepted 10% of the common stock of Zirconium in lieu of royalties and thereupon designated a representative to serve on the Board of Directors of Zirconium (Ex. 356, Vol. II, p. 1308). National exchanged technical information with Zirconium, it gave Zirconium engineering assistance in connection with the installation and use of its processes, and it licensed Zirconium to use pulverizing machinery available to National and through National to du Pont (Ex. P2, Vol. I, pp. 446-54).

As a stockholder of Zirconium, National gave Zirconium such advice and assistance as might reasonably have been expected; but National lacked confidence in the management of Zirconium and from time to time endeavored to sell its Zirconium shares. Finally, in April 1944 the National-Zirconium agreement was cancelled, the parties exchanged releases, and National assigned its shares of Zirconium to Glidden (Finding 84, R. 62-3; Ex. NL 28, Vol. IV, pp. 3954-4060; R. 1081-1103).

12. Virginia Chemical Company (1937)

Some time prior to 1937 Virginia Chemical Company began the manufacture of TiO_2. Believing that Virginia Chemical was probably infringing its patents, National so notified Virginia Chemical, and in consequence there were several conferences attended by technical employees of the two companies to determine what infringements, if any, were taking place (Finding 85, R. 297). When it was determined by National that Virginia Chemical was in fact infringing, National offered Virginia Chemical a license under all its patents in the "licensed field" on a 2% royalty basis. This offer was refused, and no agreement of any sort has ever been made between National and Virginia Chemical, and no suit for infringement has been instituted by National (R. 904, 909).

13. Pulverizing Machinery Licenses (1939-1944)

In 1939 National undertook to adapt a patented machine known as the Micromizer Reduction Mill for use in the manufacture of titanium pigments. Following developments and changes by National, the machinery proved of substantial value as a means of improving the texture of

titanium pigments; and National secured an exclusive license, with the right to grant sublicenses, for titanium pigments manufacture, from the patentee, International Pulverizing Corporation. National licensed du Pont and Zirconium and was willing to license any other company which had licenses under its titanium pigments patents on identical terms with those National was required to pay the licensor. In October 1944 National relinquished its exclusive license and took in its place a non-exclusive license (Finding 81, R. 60-1; Ex. NL 31, Vol. IV, pp. 4073-6).

14. New York Ilmenite Mining Development (1941)

Owing to the impossibility of continuing to import ilmenite from India, in 1941 National opened up a domestic source in Essex County, New York. National was directed by Office of Production Management to, and did, offer participation in this project to each of the other producers of titanium pigments in the United States. The offer was accepted by du Pont. As a result of the investment of more than $10,000,000 by National, and its management, since about July 1942 there has been a domestic source of ilmenite which was sufficient for the demands of World War II. The directive of the Office of Production Management was approved by the Attorney General of the United States (Finding 36, R. 248; Ex. NL 28, Vol. IV, pp. 3991-4008; R. 1094-6).

Specification of Errors, Statement of Issues, and Summary of Argument

There are three appeals.

In No. 89 the Government assigns as error the refusal of the District Court (*a*) to require royalty-free licensing, (*b*) to require, at a reasonable charge, the furnishing of technical information relating to the methods or processes for manufacturing titanium pigments, (*c*) to require divestiture of at least one half of both National's and du Pont's domestic titanium plants and business, and (*d*) for certain other incidental relief (Assignment of Errors, R. 330-1).

In No. 90 National and Titan complain that the decree is too broad in certain respects (A. of E., Par's 1, 2, R. 336-8), and that the provision for divestiture of stock in certain foreign companies is unreasonable and unwarranted (A. of E., Par. 5, R. 338). They assign as error the provision for compulsory licensing of existing patents on a uniform, reasonable royalty basis (A. of E., Par. 3, R. 338).

In No. 91 du Pont assigns numerous errors which presumably will be discussed in its brief.

In order to submit a single, coordinated brief in opposition to parts of the Government's appeal and in support of other parts, as well as in support of the National and Titan defendants' appeal, three weeks before the case is called (Rule 27), when the Government's brief must also be submitted, and to obviate, or at least reduce the length of, reply briefs, we have endeavored to anticipate the Government's points and have arranged our brief accordingly.

We think the Government will contend that National and du Pont have used their patents in violation of the

Sherman Act and that they should therefore be compelled to license any applicant royalty-free under their existing patents and patent applications. We shall not oppose this contention, but on the contrary shall affirmatively support it.

We believe the Government will also contend that National and du Pont have so conspired in violation of the Sherman Act that divestiture of at least one of the titanium pigment plants of each is required to create competition in the titanium industry. In opposition to this we shall contend that competition now exists, and has always existed, between National and du Pont and that, if royalty-free licensing is required, any potential producer having the necessary capital can enter the industry without restraint or hindrance.

In support of our contention that the judgment is too broad in certain respects we shall demonstrate that the court erred in enjoining any new agreements containing any of the provisions of the cancelled agreements. If this provision prevails, National and Titan will be unable to enter into normal business arrangements.

As to the provision for divestiture of stock interest in certain foreign companies, we shall show that such divestiture will restrain trade rather than create a condition free from restraint.

We shall deal first with the issues now raised by our appeal (No. 90), then with a point made only on the Government's appeal (No. 89).

Argument

I

The District Court erred in enjoining the further performance of any of the provisions of the cancelled contracts and of any agreements amendatory thereof or supplemental thereto and enjoining normal and usual arrangements between the defendants and other producers of titanium products.

Paragraphs 5 and 6 of the judgment perpetually enjoin National and Titan from the further performance of *any* of the provisions of the cancelled contracts and of any agreements amendatory thereof or supplemental thereto, and also enjoin the making of any new agreement between these defendants and other producers of titanium products which has as its purpose or *effect* the continuing or renewing of any of the cancelled agreements (R. 310-13).

Paragraphs 5 and 6 should be amended by eliminating the language italicized below, as follows:

> "5. The following agreements are hereby adjudged to be unlawful under Section 1 of the Sherman Act and each of them is hereby cancelled *and the defendants and each of them and all persons acting or claiming to act through, for or under them and all successors and subsidiaries of any of the defendants are hereby enjoined and restrained from the further performance of any of the provisions of said agreements and of any agreements amendatory thereof or supplemental thereto:* [followed by a list of the cancelled agreements]"

> "6. Each of the defendants and each of their directors, officers, agents, employees, successors and sub-

sidiaries and all persons acting, or claiming to act under, through or for them or any of them are hereby enjoined and restrained (*a*) *from entering into, adhering to, maintaining or furthering, directly or indirectly, or claiming any rights under any contract, agreement, understanding, plan or program among themselves, the co-conspirators, or with any other person, partnership or corporation, which has as its purpose or effect the continuing or renewing of any of the agreements listed in paragraph 5 hereof;* (b) from entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program with any other producer or dealer relating to titanium pigments which has as its purpose or effect (1) to divide sales or manufacturing territories, (2) to allocate markets, (3) to limit or prevent United States imports or exports, (4) to grant to any third party any market as its exclusive territory, (5) to keep any third party out of any market; provided, however, that nothing contained in this subdivision (b) of this paragraph 6 shall prohibit any normal and usual arrangements between any defendant and its directors, officers, employees, agents, subsidiaries, or any PRODUCER, dealer or distributor, whether or not a co-conspirator; (c) from restricting any purchaser of titanium pigments in the use thereof."

Paragraph 6 should further be amended by adding to the proviso clause the word PRODUCER as indicated above.

Any rearrangement of stock ownership in the foreign companies—in fact, the very action compelled by paragraph 8 of the judgment (the disposition of National's stock in foreign companies, or the acquisition of the stock of others in such companies)—is necessarily amendatory of or supplemental to the cancelled agreements.

The District Court cancelled contractual relations between parties when, in most cases, only one of the parties was before the court and subject to its jurisdiction. It will be sufficiently difficult for National and Titan to adjust their relations with their foreign associates in any case without having their hands tied by a prohibition against any adjustment whatsoever. Titan should be free to negotiate reasonable settlements, provided the restraints contained in the cancelled agreements are not renewed or continued.

The assignment of patents, grants of licenses under patents not listed in the appendix to the judgment or defined in paragraph 4 thereof—in short, practically any action the defendants might naturally and properly take in the future would be prohibited by the unnecessary injunctions and restraints contained in paragraphs 5 and 6.

We recognize, as indeed we must, that the "United States is entitled to effective relief". *Local 167 et al.* v. *United States*, 291 U. S. 293, 299 (1934). The task before the court is that of

> ". . . fashioning a decree in an Anti-trust case in such way as to prevent future violations and eradicate existing evils, . . ." *Associated Press et al.* v. *United States*, 326 U. S. 1, 22 (1945).

The object is the creation of

> ". . . a new condition which shall be honestly in harmony with and not repugnant to the law." *United States* v. *American Tobacco Company*, 221 U. S. 106, 187 (1911).

To perform that task, the court is faced

> ". . . with the difficult problem of awarding an injunction which would insure the desired end without

imposing punishments or other sanctions . . ." *Hartford-Empire Co. et al.* v. *United States*, 323 U. S. 386, 408 (1945).

This problem has been described as

"The determination of the terms of the judgment which will accomplish that which is necessary in the public interest and which will not deal unfairly with the defendants . . ." *United States* v. *Pullman Co. et al.*, 53 F. Supp. 908 (E. D. Pa. 1944).

In reversing the *American Tobacco* decree, the Supreme Court said:

". . . we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property." (221 U. S. at 188)

The controlling considerations were expressed as follows (221 U. S. at 185):

". . . In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. . . ."

The courts have repeatedly emphasized that the problem of framing a proper decree is to be solved by the exercise

of a jurisdiction that is "remedial, not punitive" (*United States* v. *American Can Co. et al.*, 234 Fed. 1019 (1916)), and "is to be exercised according to the general principles which govern the granting of equitable relief" (*DeBeers Consolidated Mines, Ltd. et al.* v. *United States*, 325 U. S. 212, 218 (1945)). See *Appalachian Coals, Inc. et al.* v. *United States*, 288 U. S. 344, 377 (1933); *United States* v. *Corn Products Refining Co. et al.*, 234 Fed. 964, 1018 (1916).

These general statements are the reflection of three distinct doctrines:

First, as suggested by the extract from the old *American Tobacco* case, property interests of the defendants should be recognized and protected so far as may be consistent with the granting of effective relief;

Second, the court may not "issue a general injunction against all possible breaches of the law" (*Swift and Company* v. *United States*, 196 U. S. 375, 396 (1905)), and the corollary that an offender should not be placed in such position that it "ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction" (*New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361, 404 (1906), and see *E. W. Bliss Company* v. *United States*, 248 U. S. 37, 48 (1918)); and

Third, the court may not "create as to the defendants, new duties, prescription of which is the function of Congress" (*Hartford-Empire Co. et al.* v. *United States*, 323 U. S. 386, 409 (1945)).

The applicable principles were stated in the *Hartford-Empire* case as follows (323 U. S. at 409-10):

> "The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' "

Applying these principles to the instant case, it is submitted that cancellation of the agreements (Par. 5) and the injunction (Par. 6(b), (c)) against any continuation or renewal of the illegal provisions thereof (namely, division of sales or manufacturing territory, allocation of markets, limitation of imports or exports, restrictions on use, &c.) will insure complete, effective relief without subjecting the defendants to undue hardship and losses. Accordingly, it is submitted that the amendments requested on pages 52-3 above should be granted in the interest of promoting trade and competition in titanium pigments.

II

The court erred in refusing to order royalty-free licensing of all patents as defined in the judgment.

(On the Defendants' Appeal, No. 90)

Paragraph 7 of the judgment is as follows:

"7. Each of the defendants is ordered to grant to any applicant therefor, including any defendant or co-conspirator, a non-exclusive license under any or all of the patents as herein defined at a uniform, reasonable royalty. Such grant may, at the option of licensor, be conditioned upon the reciprocal grant of a license by the applicant, at a reasonable royalty, under any and all patents covering titanium pigments or their manufacture, now issued or pending, or issued within five years from the date of this decree, if any, owned or controlled by such applicant. Such license or reciprocal license may, at the option of either party, contain a provision for the inspection of the books and records of the licensee by an independent auditor who shall report to the licensor only the amount of royalty due and payable and no other information. During a period of three years from the date of this decree such license or reciprocal license may at the option of either party contain a provision for the imparting in writing, at a reasonable charge, by the licensor to the licensee, of the methods and processes used by the former at the date of the license in its commercial practice under the licensed patents in connection with the production of titanium pigments. The Court reserves jurisdiction to pass upon the reasonableness of any royalty or charge herein directed to be reasonable. Defendants are restrained from attempting to enforce any rights under any foreign patents owned by them or under which they are the exclusive licensees to prevent the exportation of

titanium pigments from the United States to any foreign country." (R. 313)

The expression, "patents as herein defined" means (Judgment, Par. 4) (*a*) the letters patent and patent applications listed in the appendix attached to the decree; (*b*) all divisions, continuations, or reissues of any of said patents and applications; (*c*) all patents issued upon such applications; (*d*) all patents which cover any titanium pigments or any process for the manufacture of titanium pigments issued to any of the defendants within five years from the date of the decree; all such patents which any of the defendants acquires within such five years; and all such patents of which any of the defendants becomes the exclusive licensee within such five years with power to sublicense (R. 310).

National has always been in favor of the widest possible use of patents and technical information consistent with Article XIV of the 1920 agreement. The District Court found that one of the purposes of the 1920 agreement was to utilize fully the patents and know-how of each of the parties and to promote the more rapid development of the business (Finding 46, R. 254). The parties to that agreement—Titanium Pigment Company (National) and Titan Company A/S (the Norwegian company)—were the only manufacturers of titanium pigments (R. 918-20; Finding 33, R. 245-7). Likewise, one of the purposes of the National-du Pont agreement of 1933 was to avoid the expenses and risks of patent litigation and to give each of the parties access to the other's patents and technical experience (Finding 79, R. 291-3).

National's position on royalty-free licensing was clearly stated during the conferences attended by the court and

counsel in connection with the framing of the judgment (R. 1227). It was and is National's position that, if the industry is to be freed completely of all restraints, the licensing of the patents involved must be completely unfettered and unrestricted (R. 1227-8).

This Court refused to approve royalty-free licensing in *Hartford-Empire Co. et al.* v. *United States*, 323 U. S. 386, 413-16 (1945). But each Sherman Act case depends on its own facts. *United States* v. *Union Pacific Railroad Company*, 226 U. S. 470, 474 (1913). A judgment should grant relief that is effective and adequate to the occasion. *Local 167 et al.* v. *United States*, 291 U. S. 293, 299 (1934); *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 308 (1897).

The *Hartford-Empire* case is distinguishable. Hartford-Empire is a patent holding and developing company. It does not manufacture glassware except for experimental purposes. Its income is derived from royalties and fees obtained from the licensing and leasing of its machinery. *United States* v. *Hartford-Empire Co. et al.*, 46 F. Supp. 541, 546 (N. D. Ohio 1942). Hartford-Empire does not compete with its licensees; the requirement for uniform, reasonable licensing of its patents puts every glass manufacturer who uses the patents on an equal footing.

National and du Pont, on the other hand, manufactured and sold 46.4% and 45.1% respectively of the pure TiO_2 produced in the United States in 1943 (Findings 3, 9, R. 236, 237); together they dominate and control the titanium pigment business in the United States (Finding 79, R.

291-3) to the exclusion of all actual or potential competition (Finding 95, R. 303-6). The court therefore held that

> ". . . plaintiff is entitled to a decree which will restore titanium to the system of free competition; the means of preventing such development must be destroyed and the power to prevent it must be shorn from those who, by combination, have acquired it." 63 F. Supp. at 532 (R. 222).

According to the District Court, domination and control resulted in large part from a proliferation of patents (Finding 79, R. 291-3) and from a monopoly of technical information relating to the manufacture and use of titanium pigments and certain apparatus and equipment necessary to such manufacture, to the exclusion and detriment of other producers engaged in the titanium pigment business in the United States (Finding 95, R. 303-6).

Thus National and du Pont not only compete with their licensees but dominate the titanium industry. A requirement of uniform, reasonable royalties in no way frees competition because, no matter what the royalty may be, *in this industry* a licensee required to pay more than its licensor will be at a competitive disadvantage.

A patent owner who uses his patent in restraint of trade can not enforce the patent against infringers, at least until the effect of the illegal restraint has been dissipated. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U. S. 488 (1942); *B. B. Chemical Co. v. Ellis et al.*, 314 U. S. 495 (1942); *Mercoid Corporation v. Mid-Continent Investment Co. et al.*, 320 U. S. 661 (1944); *Mercoid Corporation v. Minneapolis-Honeywell Regulator Co.*, 320 U. S. 680 (1944).

As was said by Judge Leahy in *United States* v. *Vehicular Parking, Limited, et al.*, 61 F. Supp. 656, 658 (D. Del. 1945), refusing to grant defendants' request to vacate a paragraph in the decree enjoining infringement suits and suits for the collection of royalties on existing patents until the effects of the illegal conspiracy had been fully dissipated (though the paragraph was subsequently modified, by consent of the parties, to enjoin suits for past infringements and past royalties),

> "In this connection defendants must remember that when a patent owner uses his patent in violation of the anti-trust laws he cannot restrain infringement of it by others." (Citing the *Morton Salt*, *B. B. Chemical* and the *Mercoid* cases, *supra*.)

Compulsory licensing alone would not be enough to restore the industry to a healthy, competitive condition. If National and du Pont are permitted to receive royalties on their existing patents, they will still be in position to dominate the industry.

If it be argued that a patent right is in all respects subject to the same protection as other property, the answer is that all property rights are subject to regulation when the public interest requires it. *Barbier* v. *Connolly*, 113 U. S. 27, 31 (1885); *Lawton* v. *Steele*, 152 U. S. 133, 136 (1894). The Government possesses whatever power is "appropriate to the exercise of any attributes of sovereignty specifically granted to it by the Constitution." *United States* v. *Gaffney et al.*, 10 F. (2d) 695, 696 (C. C. A. 2d, 1926); *Nebbia* v. *New York*, 291 U. S. 502, 524 (1934). An impairment of property rights by the enforcement of a valid regulatory statute is not a taking of property in the constitutional sense. *Bedford* v. *United States*, 192

U. S. 217 (1904). This Court has long recognized that the limitations of the Fifth Amendment are irrelevant in respect to the deprivation of property rights resulting from enforcement of the Sherman Act. *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571 (1898).

The District Court has deprived the defendants of their property by restraining them from enforcing any rights under their foreign patents to prevent the exportation of titanium pigments from the United States (last sentence, paragraph 8 of the judgment) (R. 314). This is, in effect, ordering royalty-free licensing under foreign patents owned by the defendants. If such a provision is valid and appropriate in relation to foreign patents, surely the court can compel royalty-free licensing under United States patents. Consistent with our position throughout, we did not, and do not now, object to this provision of paragraph 8.

We believe, however, that royalty-free licensing should be limited to patents as defined in the judgment and should be conditioned upon a reciprocal grant from the applicant under any titanium patents owned or controlled by the applicant. This is consistent with the position National and Titan have always taken in connection with patent licensing.

Under the judgment the defendants will be freed from the conditions imposed by Article XIV of the 1920 agreement and similar conditions of other cancelled agreements. The cancellation of the illegal agreements, plus the requirement of royalty-free licensing of patents as defined in the judgment, will create a condition honestly in harmony with the law.

III

The court erred in requiring National and Titan to dispose of their stock holdings in certain foreign companies or, in the alternative, to acquire the entire stock holdings of these companies.

(On the Defendants' Appeal, No. 90)

Statement of the Problem

Paragraph 8 of the judgment requires National and Titan, within one year from the date of the judgment, to present to the court a plan for divesting themselves of their stock holdings and other financial interests in BTP, CTP, TG, and TK, or for the purchase of the entire stock holdings and other financial interests in these companies (R. 314).

National owns 50% of TG, a German company, and 18.5% of TK, a Japanese company (NL Answer, R. 41; Finding 6, R. 236-7). Though the war has ended since the trial was concluded, there is still complete lack of information concerning the condition of these companies; their future is affected by all of the uncertainties attending the occupation, demilitarization, and eventual reconstruction of Germany and Japan.

At the time of the trial National owned 44% of BTP and 49% of CTP (Findings 6, 24, R. 236, 242). The stock of these companies was held subject to contractual obligations which imposed severe restrictions on sale. In both instances National, if forced to sell, was required to sell to the remaining stockholders at book value. Book value did not include any consideration of good will, patents, or future business possibilities (Exs. F, K, Vol. I, pp. 119, 242).

The basis of this case is the 1920 agreement between Titanium Pigment Company (National) and Titan Company A/S (the Norwegian company). National now owns 87% of the Norwegian company and has an option to purchase the remaining 13% (Finding 4, R. 236). The 1920 agreement, therefore, might have been terminated but for the fact that its terms had been carried over in part into contracts between National and its British partners and National and its Canadian partner, and the fact that in the British and Canadian agreements certain provisions had been conditioned on the 1920 contract (Exs. F, K, Vol. I, pp. 119, 242).

In order to eliminate the criticized features of the agreements, a new British agreement was drafted before the trial (Ex. NL 30, Vol. IV, pp. 4066-72), and a similar agreement was being negotiated with the Canadians (Ex. NL 1, Vol. IV, p. 3820).

Shortly after the trial BTP notified National that it was planning to expand its business and desired to issue additional A shares. Under the terms of the British agreement National (Titan) was entitled to participate in stock financing on a pro rata basis. In order to facilitate the expansion of BTP, and at the same time adjust its problems with the British partners, National entered into a new agreement,— the court and the Government having been advised of the situation at a conference arranged for that purpose,—as follows:

(a) If the judgment is modified to permit National to own stock in BTP, National will reduce its interest to 25% of the present A shares and subscribe to new A shares at that rate.

(b) If the judgment is affirmed, National will sell and the British partners will buy National's entire

interest in BTP at book value, book value to be determined on a basis slightly more advantageous to National than the old agreement provided.

The new agreement is the best that National can obtain from the British in view of the extreme obligations contained in the old agreement. The judgment in this case would be no defense in a suit by BTP to enforce the old agreement.

The conditions which the court held in violation of law were "the product of agreements" (Opinion R. 201). The uncontested provisions of the judgment will completely eliminate participation by the defendants in any such agreements. The injunctive provisions will remove every illegal restraint and prevent recurrence.

National has recently entered into an agreement to purchase all of the stock of CTP,—also with the knowledge of the District Court and the Government,—and therefore consideration of the relationship between National and CTP has been taken out of this case.

The Economic Setting

It is impossible to consider the problems presented by National's stock interest in BTP without discussion of the economic factors involved. In order fully to inform the trial court on this aspect of the case, we called an expert, Dr. Imrie de Vegh, whose testimony may be found at R. 1112-45. We also printed and introduced as an exhibit the full text of Dr. de Vegh's memorandum for counsel (R. 1177, Ex. 34, Vol. IV, pp. 4108-72). The following description of the economic facts with reference to which National had to do business in the British Empire is taken from the testimony and

memorandum referred to, supplemented by references to relevant developments subsequent to the trial.

By the late nineteenth century the combination movement had progressed considerably in England and was highly successful in a number of industries. Moreover, as the competitive advantages of large size became more apparent, and especially as the financial success of monopolies resulting from the combination of a few powerful firms became obvious, a large number of huge industrial mergers took place. The control of the market exercised by the merged enterprises was further strengthened in many cases by cartel agreements with the companies that remained outside (Ex. NL 34, Vol. IV, pp. 4114-15).

The First World War gave a powerful stimulus to the combination movement; the Ministry of Munitions and other government departments found it easier to deal with trade associations than with competing individual producers. Organized for the purpose of restricting competition and controlling prices, in America today these associations would be called cartels. The problems created by them became so serious that a Committee on Trusts was appointed near the end of the war. The committee filed a report in 1919 which described the wartime evolution of combines and trade associations and stated (Cd. 9236, H. M. Stationery Office, 1919, p. 11)—"Trade Associations and Combines are rapidly increasing in this country, and may within no distant period exercise a paramount control of all important branches of the British trade."

The report was unanimous, but the four "radical" members of the committee (Ernest Bevin, J. A. Hobson, W. H. Watkins, and Sidney Webb) submitted an addendum in

which they argued that it did not go far enough. They stated that the combination movement is "both inevitable and desirable".

While after the war the purposes of the wartime combinations disappeared, the institutional changes remained. The big companies continued to grow bigger; the small companies continued to strive for agreements with competitors and for mergers in order not to go under in the competitive struggle. This latter factor became of considerable importance after 1921, when England failed to recover from the post-war slump and chronic unemployment appeared for the first time as an identified malady of modern industry.

The transitional difficulties of the post-war period provided a powerful incentive for defensive measures on the part of industry. British industry realized that it was losing out in the international competitive race with the more modern industries of the United States, Germany, Japan, and even of the smaller European industrial countries like Belgium, Sweden, and Switzerland. The chronic unemployment of the 1920s, the failure of England to maintain her share in the world's export markets, the invasion of the British home market by foreign industries, all tended to foster combinations in British industry (see Ex. NL 34, Vol. IV, pp. 4121-4).

By 1926 the Liberal Party was thoroughly alarmed by the challenge to orthodox liberalism inherent in post-war developments. It appointed a committee to study the situation, including W. T. Layton, editor of *The Economist*, Lloyd George, H. D. Henderson, Philip Kerr (subsequently

Lord Lothian), J. M. Keynes, Sir Herbert Samuel, Sir John Simon, R. H. Brand, D. H. Robertson, Sir Josiah Stamp, and others less well known in the United States. These men constituted the intellectual leadership of the Liberal Party and, in a large measure, that of England. Their report was published after eighteen months of deliberations, entitled *Britain's Industrial Future being the Report of the Liberal Industrial Inquiry.* It commands great attention, reflecting the ideas of leading English liberals and academicians as to how much of the liberal ideology of the nineteenth century could be salvaged. Chapter VIII of the report is devoted to trusts and trade associations. The report states that

> ". . . this very proper objective [the protection of the public interest] is not to be secured in these days by mere attempts to restore the old conditions of competition, which often involve waste and effort, the uneconomic duplication of plant or equipment, and the impossibility of adopting the full advantages of large-scale production.
>
> "In modern conditions a tendency towards some degree of monopoly in an increasing number of industries is, in our opinion, inevitable and even, quite often, desirable in the interests of efficiency. It is, therefore, no longer useful to treat trusts, cartels, combinations, holding companies, and trade associations as inexpedient abnormalities in the economic system to be prevented, checked, and harried. The progression from purely private individualistic enterprises to the Public Concern is one of the endless gradations and intermediate stages. . . ." (pp. 92-3)

By the end of the decade British industry was among the leaders of the world-wide concentration movement. It exercised a tight control over its domestic and imperial markets. In addition to the growing complexity of in-

dustrial production, marketing, and trade, the tariff protection of key industries, which was enacted after the World War, considerably assisted trustification and cartelization. The McKenna Duties of 1915 and the Key Industries Duties of 1921 were the first breaches in the free-trade system of England, where the only duties previously known were a few levies raised for revenue (*e. g.* on tobacco). The profit possibilities to be derived from economic concentration were enhanced by the tariff, which raised the delivered price of potentially competitive imports.

The highly tolerant view British legislation and courts took with respect to restraints of trade, the narrowness of their interpretation of what was an unreasonable restraint, and their refusal to consider any but the most specific evidence, contributed to the development of highly restrictive practices throughout British industry. This meant that what would be considered competitive behavior in the United States was at a discount and would have tended to provoke violent retaliation by an entire industry against the aggressor enterprise. A tacit code of non-competitive industrial discipline was built up which was and is of the greatest effectiveness.

During the 1930s two major changes occurred, both of which propelled industry further in the direction of concentration and coordination. First was the adoption of protectionist foreign trade policies. England adopted a full-fledged protectionist tariff in 1932. At the Ottawa Conference in the same year, moreover, a system of Imperial preference was established which went far to guarantee the Imperial market for British manufactured products. Having become a protectionist country, England enabled a number of her industries, in which previously the

absence of a tariff enforced some measure of competition, to reduce their competitive activities.

The second major development was the growing conviction that cartels, trusts, and other forms of industrial agreements and mergers are helpful tools of British national policy. Compulsory cartelization was attempted in cotton spinning, coal, and steel, among others. The British Government took an active interest in the international steel cartel negotiations; it made tariff and quota protection of the industry conditional on rationalization and reorganization; it backed the numerous international commodity agreements that involved British Empire producers. The Sugar Industry Reorganization Act of 1936 enacted a compulsory merger of all beet sugar manufacturing companies.

With the German example before their eyes, British Government officials and corporation executives became increasingly aware of the advantages to the execution of national policies that could be derived from industrial combination. They saw that monopolistic agreements among raw materials producers were a very effective way to increase the total proceeds of exports, and the total revenues accruing therefrom, both to the producing interests and to the national economy as a whole. These considerations were powerful in the formation of raw materials cartels throughout the British Empire, such as the rubber cartel, the tin cartel, and numerous other agreements among British Empire producers. They also became aware of the advantages of regulating trade and payments relations between England and foreign nations on a comprehensive basis. Among the first of such English payments agreements was the one negotiated with Argentina in 1933, the so-called Roca-Runciman Agreement. There were a num-

ber of subsequent agreements before 1939. A whole network of them was put into operation quickly after the outbreak of the war.

At the time of the trial in January 1945, one could but guess at the post-war organization of British industry and of international trade and international investment in general. It seemed unlikely, however, that the official United States policy of destroying cartels and freeing international trade and payments from all restrictions other than tariffs would succeed.*

Events have surpassed the most pessimistic expectations.

The victory of the Labor Party and the adoption of socialism as the official economic policy of the British Government mean that in Great Britain at least the combination movement will not only not be retarded, but will be accelerated on all fronts, albeit under government supervision. State monopoly is replacing whatever competition there was in a number of basic industries. Wartime controls over industrial production, prices, and distribution, over international trade, over international raw materials production and prices, have by and large been maintained and continued as effective tools of British Government policy. Economic necessity was often given as an excuse, when excuses were felt necessary, but the economic necessities invoked seem likely to continue.

American negotiators have been able to use the bargaining power of the United States to obtain minor ideological concessions from Great Britain, both at Bretton Woods and subsequently in the Anglo-American loan negotiations

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* For a summary of British statements on the subject, see Mason, *Controlling World Trade* (CED Research Study), New York, 1946, p. 40, footnote 1.

of 1945. Widespread British expressions of anxiety that acceptance of the American proposals spells the doom of a British full employment policy have led to the giving of speedy reassurances that Great Britain will not abandon controls until it is certain that they will not be needed. Again we are in the realm of guesswork as to when the British Government will consider such controls unnecessary. If it means to carry out the policy of full employment and nationalization of industries stated as its program, the chances are that relaxations will be minor and temporary, even though the former privately controlled cartels will in future be more strongly influenced by British Government policy than prior to World War II.

In most of the globe outside the United States freely competitive enterprise in the American sense does not exist today and is extremely unlikely to exist at any time in the predictable future. That this is so in Soviet Russia and all Russian satellite countries goes without saying. How soon freely competitive capitalist enterprise can be established in the former Axis countries, if ever, is an unanswerable question; but it is evident that no such development is conceivable for years to come. Similarly, there is no way to predict the eventual economic organization of China and India,

The French Empire, Spain, and most Latin American countries are conducting far flung experiments in the nationalization of industry and in controls over the nonnationalized segments. These experiments are aimed at various national purposes, most frequently at full and stable employment; occasionally they have other objectives. It is hard to find in these countries any trace of any willingness to establish or restore freely competitive enterprise, especially to open their markets to unrestricted

American competition, beyond the minimum lip service required to maintain good relations and in certain cases to obtain loans from the United States or from United States sponsored international institutions.

In November 1945 the State Department published tentative plans for an International Trade Organization. A preliminary conference was recently held in London. The final texts are not yet available in this country, but *The New York Times*, reporting on them on December 22, 1946, explicitly stated that "the basis of the United States Charter was lost". The newspaper report adds a cryptic statement to the effect that "it was replaced by a more realistic working principle: namely that the majority of the world's important trading nations are willing to collaborate for the freeing of international trade", whatever that may mean. It is possible, of course, that at some future date the defenders of free competition and price flexibility in international markets will stage a comeback. At present, however, the most elementary prerequisites of such a comeback seem to be lacking and there is no way of predicting how, when, or from what source, if ever, such a comeback can originate.

It appears that the ideological crusade to return to what the Department of Justice conceives as normalcy in international trade and investment has to date been fighting a sequence of disastrous rearguard actions. The concepts of the Department of Justice in respect of international economic affairs not only have not made any converts abroad, but cannot make any unless paid for by direct economic concessions on the part of the United States. The reason for this is that foreign countries have found controlled international trade and investments extremely helpful to national economic policy, in that

(a) they help to maximize the proceeds of exports and to minimize the costs of imports;

(b) they help to insulate internal economies of countries against sudden foreign exchange losses that would otherwise rise from a decline of exports or an increase of imports, and generally against economic fluctuations in other countries, often referred to in British literature as the "export of unemployment"; and

(c) they help to integrate foreign trade and investment in economic reconstruction and full employment policies that foreign nations are pursuing along entirely different lines of economic policy and economic thinking from those prevailing in the United States.

Let us disregard, however, the implications of the sweep of state socialism over the rest of the world and review, instead, the possible methods of operation of American companies abroad on the basis of the experience of the relatively capitalistic and competitive period between the first and second world wars.

An American company wishing to engage in foreign business is limited to three methods of operation: (*1*) exports, (*2*) imports, (*3*) production abroad. Production abroad may take place by wholly-owned subsidiaries, by partly owned foreign enterprises, or by licensing companies wholly owned by foreigners.

With respect to exports, foreign governments have used tariff increases, government subsidies, import licenses, and other means to force American exporters to build up manufacturing production within the foreign frontiers.

To the extent that American corporations are importers of foreign products, or processors of foreign raw

materials, their interest is to buy at the lowest possible price. To the extent that they are producers of products that are competitive with potential imports, their interest lies in having tariff protection and other legal means to reduce the threat of foreign competition. If territorial limitations were impossible, self-protection would prevent American corporations from licensing foreign corporations that have lower costs. This would hardly be in the interest of anyone.

American corporations can engage in production abroad directly by wholly-owned subsidiaries or by partly-owned foreign enterprise, or indirectly by licensing an enterprise wholly-owned by foreigners.

The American owner of a wholly-owned foreign subsidiary has been in an increasingly difficult position for the last fifteen or more years. The pressure to replace exports from the United States by local facilities was followed, when the local facilities were American owned, by a pressure to have the local facilities at least partly locally owned.

The wholly-owned American subsidiary is handicapped with respect to adaptation to local customs, tastes, sales methods. What is worse, it remains a "foreign" enterprise against which local interests can always stir prejudice. Examples abound of discriminatory action against such wholly-owned American subsidiaries abroad.

Partnership with local groups and royalty agreements based on patent licensing are the two ways of forming a community of interests with someone inside the fort. These are the only ways to stay in foreign business and avoid discrimination directed against "foreign" enterprise. Short of withdrawal from business abroad, they

are the only practicable alternatives to a policy of economic aggression from the outside by competitive exports or to a policy of economic aggression from the inside by wholly-owned subsidiaries. Foreign nations use every known means to resist these types of economic aggression. In such a fight the enterprise trying to invade foreign territory is always in a weak position. Especially in view of high American wage costs and of important steps that have been taken in recent years to teach American technology to foreign nations, it is hard to believe that we shall be able to maintain a major position in foreign markets without cooperation with local interests.

Barring trade based on open or concealed subsidies, the only further alternative to economic aggression or economic cooperation is a withdrawal from business abroad. Such an ostrich-like policy of economic isolationism not only would be costly in terms of lost sales and assets but would eventually show up in a slowing down of our technological and economic progress.

Lack of agreement regarding export markets would not only not necessarily result in increased total exports, it would be likely to result in less. Small local enterprises would spring up behind each new tariff wall, the costs of production would be higher, and prices to the consumer more erratic. This in turn might mean a failure of a new product to be developed properly and to reach the public in quantity, except after considerable delays.

The Authorities

We have outlined the economic problems affecting the British market in considerable detail because the sale of National's stock in BTP or, in the alternative, the purchase

of all of BTP's stock, is the principal problem which confronts us under paragraph 8 at this time. These same factors exist to a greater or lesser extent in all export markets.

The District Court refused to consider these factors, holding that this was a matter for Congress to consider and not for the courts (Opinion, R. 208).

The necessity of molding decrees in antitrust cases "to the exigencies of the particular case" has recently been emphasized by this Court. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185 (1944). Even more recently this Court said:

> ". . . A full exploration of facts is usually necessary in order properly to draw such a decree. . . ." *Associated Press et al.* v. *United States*, 326 U. S. 1, 22 (1945).

It is submitted that both the facts and the relevant authorities require the elimination of the District Court's drastic order of divestiture. No case has been found in which acquisition by an American company of stock in a foreign company engaged in the same business has been held an illegal restraint of foreign commerce. It is not conceivable that such an acquisition, standing by itself, would violate the Sherman Act. An American company surely may join with foreign companies in creating a foreign manufacturing concern without subjecting itself to a charge of antitrust violation.

The contrary view would cast doubt on the legality of the operations of every industrial concern which engages in production abroad through corporations organized under foreign law, unless the corporations are wholly-owned subsidiaries.

The courts have often said that the Sherman Act does not make unlawful normal commercial arrangements or methods of expansion. *Standard Oil Company of New Jersey et al.* v. *United States*, 221 U. S. 1, 62, 81 (1911); *United States* v. *American Tobacco Company*, 221 U. S. 106, 179 (1911); *United States* v. *Reading Co.*, 226 U. S. 324, 369 (1912); *United States* v. *United States Steel Corporation*, 251 U. S. 417 (1920).

Perhaps the best known statement on this subject is that in which the Supreme Court, in the old *American Tobacco* case, discussed the decision which it had just announced in the *Standard Oil* case. Mr. Chief Justice WHITE wrote:

> ". . . It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. . . ." (221 U. S. at 179)

In the *Steel* case, the dissenting judges, while voting for dissolution, recognized that

> ". . . it was not the purpose of the act to condemn normal and usual contracts to lawfully expand business and further legitimate trade. . . ." (251 U. S. at 461)

The "rule of reason" has been applied by the courts not only in determining the legality of contracts and combinations, but also in formulating the relief which should be decreed against those found to be illegal. The authorities to this effect are reviewed on pages 94 and 95 of this brief and need not be repeated here.

A striking analogy to the present case is found in *United States v. Great Lakes Towing Co. et al.*, 208 Fed. 733 (N. D. Ohio ~~1913~~), 217 Fed. 656 (1914), appeal dismissed 245 U. S. 675 (1917). The court there found that the defendant had illegally restrained trade and acquired a monopoly of the towing facilities in fourteen Great Lakes ports. Although the court at first expressed doubt as to the adequacy of an injunction without dissolution, it allowed the defendant to present a plan for the elimination of the offending practices (208 Fed. 733, 747). On the settlement of the decree, the court reached the conclusion that the continued existence and operation of the defendant "under proper and stringent injunctive regulations" would "give better assurance of free competition and better public service than is promised by a division of the towing company's properties among several new ownerships" (217 Fed. 656, 661). The court pointed out that the evil to be remedied was not the ownership by the Towing Company of the stocks and physical properties of the formerly independent companies. As in the present case, the gravamen of the offense consisted of extrinsic wrongful practices rather than stock acquisitions. Those practices were summarized in the following statement (217 Fed. at 659-60):

> ". . . The combination represented by the towing company violates the Sherman Act because it is a monopoly created by abnormal and unfair means, the most important of which are (a) the system of exclusive contracts by which vessel owners who employ throughout the entire season the towing company's tug and wrecking service, at all the ports covered by its tariffs (so far as the vessel owner had occasion for such service), receive a large discount from tariff rates, which is denied to all others; (b) the giving of special concessions, rebates, and discriminations to customers;

(c) the restraint of competition by means of operating contracts, by unnecessary conditions imposed upon sellers of towing properties to buyers of tugs from the towing company; and (d) unfair rate wars, all adopted or engaged in for the purpose of obtaining and effectuating monopolistic control. Unless for such means, purposes, and practices, the size alone of the combination, or the mere unification of the towing interests thereby brought about, would surely not justify putting the towing company entirely out of business."

The court's discussion of the alternative remedies available to it has significance in the present case. It said (217 Fed. at 660):

"Merely enjoining further operation by the towing company would injure, rather than benefit, the public by depriving it of the present service pending the reorganization of a new and sufficient service. A receivership, and operation thereunder, until competitive conditions should be restored, without utilizing the towing company's property, would amount to a partial and unnecessary confiscation. We are thus left practically to a choice of two remedies: First, selling the towing company's properties to purchasers dissociated from the officers, directors, and stockholders of the towing company, with the expectation that operations will be carried on under a number of separate and independent ownerships, each confined to a given port or group of ports, and by receivership insuring a continuance of service pending sale and the ability to deliver the towing company's properties upon sale; or, second, to permit continued operation by the towing company only upon complete elimination of the offensive practices under which its monopoly has been created and maintained, and the imposition of such injunctive restrictions as will keep the way open for full and free competition. The towing company is before the court

and subject to its injunctive processes, including punishment for disobedience thereto; and if we can impose upon that company prohibitions, susceptible of enforcement, which shall eliminate past abuses and remove obstacles to free competition, such course would provide the most effective relief available, and so would manifestly be for the public interest."

It was accordingly held that all the offending practices should be enjoined, and that receivership and sale would be resorted to only if the defendant did not consent to be bound by the plan embodied in the court's decree.

The *Great Lakes Towing* case was recently cited with approval in the concurring opinion of Mr. Justice DOUGLAS in *Associated Press et al.* v. *United States*, 326 U. S. 1. The method of approach adopted by the court in that case, and the principles which it announced, are supported in many other cases under the Act. See *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912); *United States* v. *Keystone Watch Case Co. et al.*, 218 Fed. 502 (E. D. Pa. 1915), appeal dismissed 257 U. S. 664 (1921); *United States* v. *American Can Co. et al.*, 230 Fed. 859 (D. Md. 1916), 234 Fed. 1019, appeal dismissed 256 U. S. 706 (1921); *American Press Ass'n et al.* v. *United States et al.*, 245 Fed. 91 (C. C. A. 7th, 1917).

In *United States* v. *American Can Co. et al.*, 234 Fed. 1019 (D. Md. 1916), the court denied dissolution of a combination which it found to have been formed illegally, although that was the only relief which the Government requested. After expressing the opinion that a decree for dissolution seemed "both unnecessary and unwise," the

court expressly rejected the argument that it was required to grant that relief. It wrote (234 Fed. at 1021):

> ". . . The insistence that the court has no choice in the matter assumes that equitable modes of relief are fixed and rigid. That is not so. The glory of chancery has always been that it could mold its remedies to meet the conditions with which it has to deal. In this case it appears probable that all potential restraints upon free competition now imposed by the size and power of defendant will pass away as speedily without as with dissolution, and that dissolution will cause far more loss and business disturbance than will attend the gradual re-establishment of competitive conditions by the play of economic forces. If so, no dissolution should now be decreed."

Similarly here, compulsory licensing will remove the restraints on potential competition in the United States and the abrogation of the cartel agreements will give free play to the economic forces at work in the foreign field.

Conclusion

The need for caution is accentuated by the fact that this is a case of first impression considered at the moment of greatest uncertainty in the field of international trade. Nobody can assert with any assurance that the compulsory divestiture of stock holdings will in fact stimulate foreign trade. We do know that the proposed order would cause National Lead incalculable loss and would place all the stock of the foreign companies in the hands of persons not subject to the jurisdiction of our courts.

The objections to foreign stock ownership, as we see it, are two-fold: *First*, the stock holdings were improperly

used to implement the cartel agreements. *Second*, the stock holdings by themselves, even upon the "dissolution" of the cartel, will restrain foreign commerce. The first objection is fully met by the abrogation of the cartel agreements and the injunction against their revival. The second must be considered in the light of the conditions now existing in the foreign field. The foreign companies will be free to enter the American market under the provisions of the decree which are not challenged. Like everyone else, they may obtain licenses under all existing American patents. The present tariff may serve as a deterrent, but defendants cannot be held accountable for that. Defendants are inhibited by the decree from using their stock ownership to bring about a renewal of the cartel or to enter into any understandings with the foreign companies by which they will stay out of the domestic market. If any such use be made, defendants will be in violation of the decree and subject to punishment for contempt. The divestment of the stock will not prevent a revival of the cartel if it be assumed that defendants would be foolish enough to violate the decree; their continued ownership of the stock will by itself result in no curb on imports without a supplemental agreement in violation of the decree. The Court will recognize that conspirators do not need stock to revive their unlawful arrangements, were they so minded. And stock will not serve as a screen to conceal any illicit understandings.

The injunction is the only effective means of preventing new arrangements for the division of international markets. The hypothetical and non-existent gains of divestiture are more than offset by the actual and incalculable loss which it would produce.

So far as exports are concerned, the inescapable fact which cannot be blinked is that the patents in the foreign countries are owned by companies not subject to the court's jurisdiction. Until these patents expire, defendants will be doing business abroad under pain of suits for patent infringement. Continued stock ownership will add no serious deterrent to foreign expansion. It is the principal means by which the defendants can do any business abroad. Divestiture is thus no real remedy, realistically considered. It is on the facts of this record wholly punitive and destructive of valuable property. We thus fail to see in what way this drastic proposal can promote the public interest.

An equity decree is an experiment in industrial regulation. (Cf. *Appalachian Coals, Inc. et al.* v. *United States*, 288 U. S. 344 (1933).) If the decree in practice proves ineffective, it can always be strengthened. Even if the facts and the law supported divestiture—which we stoutly claim they do not—the current uncertainty in the foreign fields should in itself compel the rejection of paragraph 8 of the judgment. Divestiture would be warranted only as a last resort under the compulsion of imperative and irresistible need after all other remedies have been tried and found wanting. No such showing can be made now and we are confident no need will exist in the future.

IV

The court correctly refused to order divestiture of all or part of the domestic titanium plants and business of National and du Pont.

(On the Government's Appeal, No. 89)

The suggestion that the defendants should be divested of their titanium plants and business, including technical and research personnel, was contained in the Government's proposed decree (Par. 9, R. 178-80) submitted by letter to the court dated September 14, 1945 (R. 1176), long after the case had been decided (July 5, 1945, R. 222). The point was then fully briefed and argued (R. 1176, 1197-1286).

The prayer for relief in the complaint contained no indication that such relief would be requested (R. 39-40). The only statement in the record on this subject appears at R. 368, where Government counsel in his opening statement said:

> "We also may ask the Court to consider the possibility of compulsory licensing of future patents for a limited time at a reasonable royalty and the possible divestiture of some of the manufacturing units of the defendants in this country."

Nevertheless the District Court spent the better part of two days on this question when the final decree was under discussion (R. 1197-1286) and concluded that no domestic divestiture should be required—not for lack of power in the court to require it, *"but as an act of discretion"* (R. 1286). The Government's entire argument for such relief was a plea to the court to exercise its discretion (R. 1206-7, 1208, 1212), and it was so understood by the defendants (R. 1229).

The Government has now assigned as error the failure of the court to require National to submit a plan for transferring to a new corporation, to be created by National, *one* of its two titanium pigment plants and all physical property customarily used in connection therewith, and for the sale of the stock of the new corporation to a person or persons other than the defendants and co-conspirators (R. 330).

This Court said in *United States* v. *Crescent Amusement Co. et al.*, 323 U. S. 173, 185 (1944):

> ". . . We recognize however that there is a wide range of discretion in the District Court to mould the decree to the exigencies of the particular case; and where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion. . . ."

And Mr. Justice Rutledge, in his dissenting opinion in *Hartford-Empire Co. et al.* v. *United States*, 323 U. S. 386, 441 (1945), said:

> "Shortly, in my view it is not this Court's business to fashion or rewrite the decree. . . . The reasons which thus ordinarily restrict the scope of appellate review have magnified force in anti-trust proceedings. Their complex character usually requires, as in this case, months or years for the trial court's consideration. With its maximum attention, this Court cannot possibly attain the same detailed familiarity with the cause. Nor can it frame at long distance, with the same assurance, a decree adequate for the necessity."

Probably nothing can demonstrate more conclusively the unwarranted character of this proposal than the fact that National's ownership of two titanium plants is not even mentioned in the findings or the opinion of the court. In fact, during discussion on the decree, after the trial, the

court did not know how many titanium plants National owned (R. 1267).

The legality under the antitrust laws of National's American titanium holdings was never put in issue and is entirely extraneous to the issues which were litigated. The attempt is made to punish for extrinsic violations by compelling a disposal of property, the ownership of which is fully in harmony with the requirements of the antitrust laws.

The District Court found that National is the largest and du Pont the second largest manufacturer of titanium pigments in the United States (R. 236-7). In 1943 National manufactured and sold 46.4% and du Pont 45.1% of the pure TiO_2 produced in the United States.

It also found that one effect of the 1933 agreement between them was to give them "together domination and control over the titanium pigment business in the U. S." (R. 292); and that "the agreements and understandings entered into between the defendants and the other corporations" had as one of their necessary effects the control and domination by these two companies of the manufacture and sale of titanium pigments in the United States to the exclusion of all actual or potential competition (R. 304-5).

The agreements referred to in the two latter findings, however, are those which have been cancelled by the provisions of the decree to which no exception is now taken by these defendants. That the original entry of National into the titanium business was lawful is unquestioned. Nor has there been any attack upon the method by which it acquired any of its United States property. The Court found that National and du Pont actively compete for customers; that there is no allocation of territory or

customers between them; that each maintains a large, highly trained technical sales force engaged in endeavoring to sell titanium pigments; that the buyers of titanium pigments are mainly well-informed, experienced purchasing agents; and that the production of titanium pigments has steadily increased in volume at a steadily declining price to the customer (R. 290, 207). Accordingly, the Government's position, put in its strongest light, must come down to this: That two companies, doing approximately the same volume of business, which are actively engaged in competition, can be required to dispose of all properties used in the business solely because of their past participation in an international cartel and patent pool. This is contrary to all authorities and is repugnant on every consideration of fairness and justice.

> ". . . Dissolution is not a penalty but a remedy; if the industry will not need it for its protection, it will be a disservice to break up an aggregation which has for so long demonstrated its efficiency. . . ." *United States* v. *Aluminum Co. of America et al.*, 148 F. (2d) 416, 446 (1945).

Dissolution in this case would not be remedial of any wrongdoing committed by defendants; it would be completely punitive; it would break up a business which has long demonstrated its efficiency, thus rendering a disservice to the public as well as to National, its stockholders and employees.

The rationale of the use of dissolution to break up an unlawful combination in appropriate cases finds its classic statement in the decision of this Court in the *Standard Oil* case:

> "It may be conceded that ordinarily where it was found that acts had been done in violation of the stat-

ute, adequate measure of relief would result from restraining the doing of such acts in the future. *Swift v. United States*, 196 U. S. 375. But in a case like this, where the condition which has been brought about in violation of the statute, in and of itself, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of two remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."

The Court goes on to admonish that

"In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." (221 U. S. 77-78)

In every adjudicated case in which dissolution of a going business has been ordered there was an unlawful integration or fusion of separate business units. In no case has divestiture of property been ordered where there was no such fusion or where the violation of the antitrust laws consisted of agreements or activities of legally independent busi-

nesses. In every case the unlawful fusions were brought about by some unlawful acquisitions. The issue litigated in every case was the legality of the integration. Thus in *Northern Securities Company* v. *United States*, 193 U. S. 197 (1904), it was held that the formation of the holding company ordered dissolved had "the direct and necessary effect . . . to restrain and monopolize interstate commerce by suppressing or . . . 'smothering' competition between the lines of two railway carriers" (193 U. S. at 354). The same is true of the other railroad cases. *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61 (1912); *United States* v. *Southern Pacific Company et al.*, 259 U. S. 214 (1922). In the former case, the Court ruled "that a combination which places railroads engaged in interstate commerce in such relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate commerce is unduly restricted or suppressed, is within the condemnation of the act" (226 U. S. at 85).

The *Standard Oil* and *American Tobacco* cases rest on the illegality of the acquisitions by which the oil and tobacco monopolies were created. Both litigations involved numerous property and stock acquisitions, and flagrant violations of both Sections 1 and 2 of the Sherman Act were expressly found (221 U. S. 1, 45, 74; 221 U. S. 106, 142, 184). The anthracite coal cases are equally clear on this point. *United States* v. *Reading Company et al.*, 253 U. S. 26 (1920); *United States* v. *Lehigh Valley Railroad Company et al.*, 254 U. S. 255 (1920).

The cases which did not reach the Supreme Court are no different. Dissolution was ordered in *United States* v. *E. I. du Pont de Nemours & Co. et al.*, 188 Fed. 127 (C. C. Del., 1911); *United States* v. *Eastman Kodak Co. et al.*, 226

Fed. 62 (W. D. N. Y. 1915), 230 Fed. 522 (1916); *United States* v. *Corn Products Refining Co. et al.*, 234 Fed. 964 (S. D. N. Y. 1916), appeal dismissed 249 U. S. 621 (1919).

In the *du Pont* case, the court found that the defendant was the successor to a trade association which had fixed prices; that this illegal combination "had been so completely transmuted into a corporate form that the trade association was no longer necessary" (188 Fed. at 152). In the *Eastman Kodak* case, the court found that one of the methods by which the defendant had procured a monopoly was "the acquisition of competing plants, businesses, and stockhouses, accompanied by covenants restraining the vendors from re-entering the business" (226 Fed. at 80). In the *Corn Products* case, the court found that over a period of years four different fusions had been effected with the purpose of monopolizing the business; and that each time predatory practices had been used in an effort to maintain the monopoly.

That the creation of the close-knit combination or fusion (as distinguished from a loose-knit confederation or agreement) was itself a violation of the statute in all of these cases, was recently pointed out by this Court in *United States* v. *Crescent Amusement Co. et al.*, 323 U. S. 173, 189 (1944), this Court said:

> "The Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations. Dissolution of the combination will be ordered where the creation of the combination is itself the violation. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 354-360; *Standard Oil Co.* v. *United States, supra; United States* v. *American Tobacco Co., supra*, pp. 186-188; *United States* v. *Union*

Pacific R. Co., 226 U. S. 61, 97; *United States* v. *Reading Co.*, 253 U. S. 26, 63; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; *United States* v. *Southern Pacific Co.*, 259 U. S. 214; *United States* v. *Corn Products Refining Co.*, 234 F. 964, 1018. Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. But the relief need not, and under these facts should not, be so restricted. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. Hence we do not think the District Court abused its discretion in failing to limit the relief to an injunction against future violations. . . ."

The divestiture ordered related to the affiliation of various chains of theatres; the chains themselves were not broken up and the defendants were not expelled by the decree from the business of exhibiting motion pictures.

The *Crescent* case, as the foregoing quotation shows, creates no exception to the proposition that divestitures have been ordered only in cases where there have been unlawful acquisitions. The refusal of this Court in that case to require the District Court to distinguish between the lawful and the unlawful acquisitions does not make the case different from the *Standard Oil* or the *American*

Tobacco cases, in each of which there had undoubtedly been acquisitions of particular units that would not have been unlawful if separately considered. The use of unlawful acquisition of a competing business as one of the methods of accomplishing an unlawful result has led the courts, in the cases which have been cited, to decree dissolution of the resulting illegal entity. In no case where that element was lacking has dissolution ever been ordered.

The authorities establish, furthermore, that even in the cases where the business has been unlawfully assembled, so that dissolution may be an appropriate remedy, it is far from a necessary one. Dissolution thus was denied in *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383 (1912). It was also denied in the *Hartford-Empire* case by the District Court, 46 F. Supp. 541. This determination was affirmed, 323 U. S. 386, 408.

> ". . . Separation is not an end in itself; it is a means to provide an open market. . . ." *United States* v. *Pullman Co. et al.*, 53 F. Supp. 908 (E. D. Pa. 1944).

In *United States* v. *Great Lakes Towing Co. et al.*, 217 Fed. 656 (N. D. Ohio 1914), 658, the court said:

> ". . . While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than to dissolution, except where restraint alone is inadequate."

Likewise, in *United States* v. *American Can Co. et al.*, 230 Fed. 859 (D. Md. 1916), the court found that the defendant, which had acquired approximately 50% of the tin can industry, was organized to monopolize the manufacture of cans and that predatory practices had been indulged.

The only relief which the Government sought was dissolution of the company, and that was denied (234 Fed. 1019). In his opinion on the scope of relief, Rose, *J.*, stated (234 Fed. at 1019-20):

> ". . . Jurisdiction of a court of equity is remedial, not punitive. A dissolution may not be decreed, unless there is reason to believe that more good than harm will come of it. . . . It is the duty of the courts to give effect to the legislative will, but it is equally their duty so to shape their decrees as to bring about the result desired by Congress with the least possible waste of anybody's time or of anybody's money."

See *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 519 (E. D. Pa. 1915).

It has been shown that dissolution is a remedy that has been worked out by the courts to sever aggregations that should never have been formed, to correct conditions brought about by an ownership which is in itself unlawful. The foregoing cases show that, even in such cases it is a form of relief that is used sparingly and only when necessary. We have shown, too, that this is not such a case, and that the legality of defendants' acquisition and ownership of its American plants was not challenged by the plaintiff or considered by the court. It follows that the suggestion that this defendant be required to dispose of one of its domestic plants is wholly unwarranted.

The authorities plainly show that the plaintiff could not have succeeded had it litigated the lawfulness of defendant's ownership of its business. The cases heretofore considered are those in which illegal acquisitions were found to have occurred and unlawful practices indulged. That National Lead's position in the industry is in har-

mony with the antitrust laws is demonstrated by the cases upholding close-knit combinations whose power, position, and practices were not deemed objectionable. *United States* v. *United States Steel Corporation et al.*, 251 U. S. 417 (1920); *United States* v. *International Harvester Company et al.*, 274 U. S. 693 (1927); *United States* v. *Keystone Watch Case Co. et al.*, 218 Fed. 502 (E. D. Pa. 1915), appeal dismissed 257 U. S. 664 (1921); *United States* v. *Quaker Oats Co. et al.*, 232 Fed. 499 (N. D. Ill. 1916), appeal dismissed 253 U. S. 499 (1920).

In each of these cases the percentage of its industry which the defendant possessed was greater than that of National Lead in the domestic titanium market. The Steel Corporation controlled approximately 50% of the industry. International Harvester controlled 64% of its industry when the Supreme Court held that the plan of dissolution under a consent decree had brought about "a new situation in harmony with law." In the *Keystone Watch* case the percentage was estimated from 42 to 47%, slightly less or slightly more than National Lead's proportion of the titanium business. Quaker Oats, by buying out a competitor, achieved up to 70 to 75% of the rolled oats production in the country. In each of these cases it was found that control of the market was not secured; there was actual competition which prevented the defendant from dominating the industry.

In the present case, the court has found that in 1943 National Lead produced 46.4% and du Pont 45.1% of the pure TiO_2 produced in the United States (R. 236, 237). The genuineness and vigor of the competition between them is established by detailed findings (R. 290-1). The court has found, however, that *between them* they control and dominate the market. This obviously means control and domi-

nation when they combine or join an existing combination such as the cartel. When the element of combination is eliminated—as it has been by the injunctive provisions of the decree—there is no such control or domination. This is manifestly sound. Neither defendant has attained or could attain that degree of control over the market which is required be ore a violation can be found. The situation is strikingly similar to that in the *Steel* case, where it was pointed out that the defendant could influence prices only by securing joint action with its competitors. These efforts at such joint action were found to have been abandoned. Here the only joint action of which there is any evidence—the pooling of patents—is removed by the injunction. The injunctive paragraphs of the judgment constitute a "dissolution" of the only illegal combination shown to have existed with reference to the domestic market and, if this Court orders royalty-free licensing, as we strongly urge, there can be no possible basis for domestic divestiture.

The present case, of course, presents no issue similar to that in *United States* v. *Pullman Co. et al.*, 50 F. Supp. 123, 53 F. Supp. 908 (E. D. Pa. 1944). The nature of the other lines handled by National was not the subject of inquiry at the trial; no evidence was offered to show that National's position in other fields was used to suppress competition in titanium or *vice versa.* National is no monopoly in any of the fields in which it operates, and the expansion of its business has been both normal and natural. In other cases in which dissolution was ordered there were not only unlawful acquisitions, but the resulting fusion over-shadowed and dominated the industry. In no case has dissolution been required of a company whose position in its industry—its power and conduct—was at all comparable to those of National.

In the *Aluminum* case, in discussing the proper method of computing the proportion of the industry controlled by the defendant, Judge HAND wrote (148 F. (2d) at 424):

> ". . . The percentage we have already mentioned—over ninety—results only if we both include all 'Alcoa's' production and exclude 'secondary'. That percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not."

We have not discussed the many questions of fact and considerations of business and public policy that would have to be explored if the matter of dissolution had been raised at the trial and were properly in issue here. We have not discussed its effect upon all those dependent upon this industry—customers, ultimate consumers, stockholders, and employees. Nor have we called attention to the unfeasibility of the proposed separation of National's titanium business into two segments. Attention need only be called to the fact that one of the two plants produces pure TiO_2 exclusively, and the other composite pigments; the separation on the basis of plants, without more, would be more of a vertical than a horizontal severance and would not produce two competing enterprises.

> Compare *United States* v. *Winslow,* 227 U. S. 202 (1913),
>
> *United States* v. *United Shoe Machinery Company of New Jersey et al.,* 247 U. S. 32 (1918).

Many similar cogent arguments of commercial expediency could be presented if this case had turned upon the validity of National's ownership of the titanium branch of its business. We can see no useful purpose in burdening this Court with such arguments when dissolution is utterly extraneous and without legal foundation, is contrary to all authority, and is obviously punitive in character.

Conclusion

The judgment should be modified as follows:

Paragraphs 5 and 6 should be modified to eliminate the injunction against normal and usual business arrangements.

Paragraph 7 should be modified to require royalty-free licensing.

Paragraph 8 should be eliminated.

In all other respects the judgment should be affirmed.

Respectfully submitted,

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